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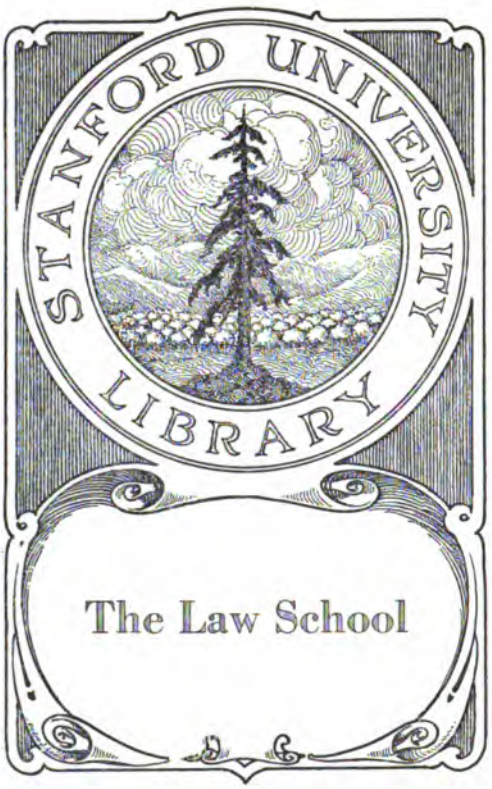

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THE NATIONAL BANKRUPTCY REGISTER REPORTS.

VOLUME XIII.

SUPREME COURT—NEW YORK.

The right of a party to an alley, the use whereof is reserved to him so long as he shall continue to own an adjoining piece of land, is not terminated by proceedings in bankruptcy which are arranged, and the estate reconveyed to him by the assignee.

COLIE v. *JAMISON.*

APPEAL by plaintiff from a judgment dismissing the complaint in an action tried by the court without a jury.

The action was brought by Samuel D. Colie against James Jamison, to recover damages for trespass in tearing down a fence erected by plaintiff, and to enjoin further trespass of the same kind. In 1867, defendant and one Gallagher, who owned certain lands in the city of Buffalo, conveyed to plaintiff a portion of the same. In the deed of conveyance, they reserved the right to the use of a certain alley which was within the limits of the lands conveyed, as long as the grantors should "continue to own" the lands not conveyed, which adjoined those conveyed. Subsequently the defendant and Gallagher were, upon their own petition, adjudicated bankrupts, an assignee in bankruptcy was appointed, and they assigned to him all their property. The plaintiff then, claiming that defendant and Gallagher having parted with their interest in the premises, the right under the provision to

the use of the alley had ceased, built a fence across the same. This fence defendant tore down, as he did two others afterward erected. To restrain such acts, and obtain damages for the tearing down of the three fences, this action was brought. After the commencement of the action, the bankruptcy proceedings having been arranged, the assignee reconveyed the premises in question to defendant and Gallagher.

Wadsworth & White, for appellant.

John B. Greene, for respondent.

Present—Mullin, P. J., E. Darwin Smith and Gilbert, JJ.

GILBERT, J.—The plaintiff asks a decree to forfeit a valuable right of the defendant on sheer technical grounds. It will be vain for him to expect that a court of equity can forget its maxims and traditions, and be astute in searching for a way to afford him relief. He is entitled to prevail only on establishing his claim *strictissimi juris*.

The question is, whether the proceeding in bankruptcy terminated the defendant's ownership of the lot adjoining the alley, and we are of opinion that it did not. The view of the subject taken by the learned judge at Special Term in substance accords with our own. The proceeding in the Bankrupt Court having been duly discontinued before any actual disposition was made of the defendant's property, that court has no further jurisdiction of the matter, and the rights of the parties must be determined by our own laws.

No doubt the title to all the property of the defendant, including his right in the alley, vested in the assignee in bankruptcy by virtue of the Bankrupt Act, and if this fact destroyed the defendant's easement for a moment it is gone forever. We think it did not have that effect. The transfer to the assignee was merely nominal and official. He took no beneficial interest whatever. The title was vested in him as an officer of the court, for the mere purpose of administration under the order and direction of the court. The transaction amounted to nothing more than a trust, the particular

objects of the trust being limited and defined by the provisions of the Bankrupt Act, and the general purpose being to convert the defendant's property into money, and with the proceeds to pay his debts. The assignee in bankruptcy was only a nominal trustee, and was, in fact, an agent appointed by law to accomplish that purpose. In such a case, a resulting trust arises by implication of law, in favor of the bankrupt, which affects all the property undisposed of in the due execution of the trust, and, as to all such property, the actual ownership in equity remains in the bankrupt. (Adams' Eq., 31.) It is expressly provided by statute that when a trust is created which vests the whole estate in law and in equity in the trustee, such fact shall not prevent the person creating the trust from granting or devising the trust estate, subject to the execution of the trust, and that every such grantee or devisee shall have a legal estate in the lands as against all persons, except the trustees and those lawfully claiming under them. (1 R. S., 729, Sections 60, 61.) Before our Statute of Trusts, a *cestui que trust* might assign or devise his equitable estate (Lew. on Trusts, Chap. 23), and the receipt of rents and profits was regarded as equivalent to legal seizin thereof. (*Id.*) While under our statute a *cestui que trust* has no estate, legal or equitable, in the lands, but only a right to enforce the trust in equity, yet this principle applies only to those persons for whose benefit the trust was created. The powers of disposition given by Sections 60 and 61 to the creator of the trust are marked indicia of ownership. (*Briggs* v. *Davis*, 21 N. Y., 574.) We think also that the defendant ought to be deemed the creator of the trust in this case within the meaning of Section 61, for it resulted solely from his petition in bankruptcy. It is also provided by statute that, when the purposes for which an express trust shall have been created shall have ceased, the estate of the trustee shall cease also. (1 R. S., 730, Section 67.) No re-conveyance is necessary, but upon the cessation of the trust, the donor goes or remains in as of his former estate. Keeping these principles in view, and looking back at the history of the defendant's proceed-

ing in bankruptcy, the trust resembles an incumbrance upon rather than an estate in the land.

It appears that the defendant continued in possession of the trust-property during the pendency of the proceeding in bankruptcy. We are of opinion that, according to a just and reasonable interpretation of the deed containing the reservation of the alley, the defendant continued to own his lot adjoining the same in the sense in which that term was used in the deed, notwithstanding the proceedings in bankruptcy. This conclusion being decisive of the case, we need not consider the other questions.

The judgment should be affirmed, with costs.*

Judgment affirmed.

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* The following opinion was delivered at Special Term:

LAMONT, J.—The justice of the peace could not try, and nothing appears to show he attempted to try the question of defendant's right of way in the alley. Counsel having treated this point as unworthy of argument, it calls for no further remark.

By way of equitable defense, the answer alleges a mistake in the deed, and asks to have it reformed. Gallagher was one of the grantors in the deed and is not a party to the action. I understand the rule to be that an equitable defense of this sort cannot avail unless such parties are in court, that the deed may be rectified by a judgment which shall bind all persons in interest, leaving no part of the controversy to be renewed by a further suit in behalf of interested parties not affected by the prior decision. That was the precise point held in *Hicks* v. *Sheppard*, 4 Lans., 335.

There is a class of cases where the warrantor of a party being notified of the claim made, and being offered the control of the action, is bound by the judgment, although not a party to the record, but a privy to a party, and in such case the objection that the warrantor is not made a party will not prevail; but this is upon the ground that the notice and the offer of the management of the suit bind him equally as if he had been a formal party. (*Andrews* v. *Gillespie*, 47 N.Y., 487.) So may a sheriff's deed be reformed, and a mistake therein corrected, if all the parties in interest are before the court. The sheriff has not an interest in such question. He warrants nothing by an official sale of lands, and the bidder purchases at his own risk. (*Bartlett* v. *Judd*, 21 N. Y., 200.) The fact of a mistake cannot be set up and prevail as a defense, unless the parties are such that the reformation of the instrument as affirmative relief may be decreed in the same action. This rule was ex-

pressed with precision at the close of the opinion of the court in *Hicks* v, *Sheppard, supra,* by Talcott, J., as follows: "The defendant, to obtain relief, must, by action or otherwise, cause the proper parties to be brought before the court, so that a judgment may be rendered binding all the parties in interest, and adjudging all their equitable rights."

There is no way, by notice or otherwise, to bind Gallagher, one of the grantors in the deed, by any judgment in the present action which shall attempt to reform it, and therefore I reject all the evidence, pro and con, taken on the trial, touching the alleged mistake in the language of the deed.

The next question is whether Jamison, the defendant, and Gallagher, the grantors in the deed to the plaintiff, have lost the right to use the alley. The plaintiff's action is wholly founded on the theory that such right of way was terminated by the bankruptcy proceedings in case of each of said grantors, and the assignment therein executed to the assignee. The deed grants the fee of the alley to the plaintiff, and then by a clause in the nature of a reservation a right to use the alley is secured to the grantors so long as they shall continue to own the remainder of said lot number five. If the grantors have ceased to own the remainder of the lot, their right of way is gone; if they have continued to own it, their right of way in the alley continues. A man may own property by a legal or equitable right and title. He may hold a naked legal title without beneficial ownership, and he may have the beneficial ownership without the bare legal right. A trustee for others is not the owner in equity nor beneficially. The beneficiaries or *cestuis que trust* who can compel a naked trustee to give them the entire benefit of property by judicial proceedings are the real and substantial owners of such property. An assignee in bankruptcy has no beneficial interest in the property he holds in that character. He holds it all in trust for others for the purpose of executing a power of sale so that the purchaser from him shall acquire a valid title, the proceeds in case of sale being held by him for the same trusts as the property itself before the sale. That trust is for the creditors to an amount sufficient to satisfy the debt, and as to the balance, in trust for the supposed bankrupt. What the said debts may be and what the surplus may be can appear only by the result of the bankruptcy proceedings. The assignee is the mere hand of the court; he may be removed by the court at any time and another or others substituted in his stead. It is the convenience or conduct for selling and transferring the title to the property, and has none of the essential qualities of ownership which is a holding for the holder's benefit. Any surplus in case of sale by the assignee belongs to the petitioner in voluntary bankruptcy, by such a right and title, that he can compel the assignee, by the action of the court, to deliver over and account to him for the whole surplus. The petitioner in such case has a beneficial interest in the property before the sale to the same extent as his interest in the surplus after a sale. Debts being out of the way, the petitioner continues to own the whole property, although it may rest in the hand of the court.

Colie v. Jamison.

In *Bullymore* v. *Cooper*, 46 N. Y., 248, Folger, J., delivering the opinion of the court, says, "that the petitioner, even if an assignment has been made, still had a contingent interest in the property assigned, and had the right to reclaim from the assignee any surplus remaining after payment of debts and expenses. For although there is no express provision to that effect in the Bankrupt Act, yet, by the force of general principles, the assignee would hold any remaining surplus as a trustee for the bankrupt, and can be compelled to account." The court thought the property of the bankrupt in the assignee's hands and before sale was such bankrupt's estate, so that he was bound to set it out in a "just and true account of all his estate, real and personal, in law and equity" (2 R. S., 32, Section 4), on his application under our insolvent laws to be discharged from imprisonment.

The grantors in the deed to the plaintiff did not cease to be owners of any estate or interest in the remainder of lot five by the assignment to the assignee, and the quantum of their estate or interest was contingent only in the sense that it could be determined or ascertained only by the result of the bankruptcy proceedings. The debts being out of the way, such estate and interest was the whole property not appropriated to pay such debts; all that was not applied to pay debts belonged to the bankrupts; their interest was capable of being reduced to certainty by the event of the proceedings in bankruptcy, and at all times continued to be such and so much as it should eventually turn out to be. As no part of this real estate was ever sold by the assignee, or disposed of by order of the court of bankruptcy, and the proceedings were dismissed by the court, which ordered each petitioner to be restored to his property, "to all the rights of property which he had on the assignee, taking charge of the real and personal estate of said bankrupt, and which still remains undisposed of," the result shows that Jamison and Gallagher lost no beneficial interest which they ever had in the remainder of lot five; that their debts were either paid or satisfied, or so taken care of that they never lost any part of this real estate. The plaintiff has failed to establish the fact that said grantors did not continue to own (beneficially) the remainder of lot five. It is also proper to consider that Jamison and Gallagher at all times continued to hold and occupy this real estate for their stable for their own benefit; that the assignee never interfered with them in such use and occupation, and never asked them for the possession.

The plaintiff, Colie, had no interest in the bankruptcy proceedings; he was not a creditor of either Jamison or Gallagher, but indebted by bond and mortgage to both. His claim that the right to use the alley was terminated or forfeited by the proceedings in bankruptcy is quite technical—is not meritorious—and ought not to prevail unless the claim is so established that the law must enforce it. To hold that the language of the deed refers not to substance, but to form, to a naked legal title which turns out to have been held in trust for Jamison and Gallagher, and not to the substantial and beneficial ownership which they appear never to have lost, either by

UNITED STATES DISTRICT COURT—KANSAS.

If the assignee voluntarily appears in a proceeding in a State court to foreclose a mortgage, instituted after the commencement of the proceedings in bankruptcy, he cannot after a sale of the property apply to the District Court for an injunction to restrain further proceedings in the State court.

JACOB AUGUSTINE, Assignee of J. M. HODGE, bankrupt, v. *NOAH C. McFARLAND et al.*

Z. E. Britton, for complainant.
Clough & Wheat, for defendants.

FOSTER, J.—The complainant files his bill in this court, asking to restrain the defendants from taking a confirmation of a sale of certain real estate of said bankrupt in the District Court of Dickinson county, and from further proceedings in said court.

John M. Hodge was adjudged a bankrupt on the 27th day of December, A.D. 1872.

The complainant, Jacob Augustine, was elected assignee of said estate on the 27th day of January, 1873, and received the assets of the estate on the 3d day of February, 1873.

On the 23d day of September, 1871, the bankrupt and his wife had executed to Jas. B. Shane and T. C. Henry a mort-

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dispossession or by equitable rights, is giving the deed a turn that never was in the contemplation of the parties to it.

Too much regard is not to be had to the proper and exact signification of words and sentences, where it will prevent the simple intention of the parties from taking effect. And whenever the language is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and of the subject-matter of the instrument. (*French* v. *Carhart*, 1 N. Y., 96.) I am of opinion that the defendant has not lost the right to the use of the alley, and that this action cannot be maintained.

gage on certain real estate to secure two promissory notes of five hundred and thirty-two dollars and five hundred dollars. There was also a second mortgage made on said real estate by said bankrupt and wife, October 29th, 1872, to Augusta Emmons, for five hundred dollars.

Noah C. McFarland became the owner of one of the notes secured by the first mortgage, and on the 8th day of August, 1873, without authority of this court, commenced proceedings in the District Court of Dickinson county to foreclose said mortgage, making Jacob Augustine, the complainant, who had become the owner of the other first secured note, a party as an individual, and also in his capacity as assignee, and also making the subsequent mortgagee, and other parties, indorsers on the notes, defendants.

Jacob Augustine appeared in his individual capacity and filed an answer in said suit setting up his said claim.

He also entered his appearance as assignee and waived the issuing of process, but filed no answer as assignee, nor made any objection to the proceedings.

On December 4th, 1873, the said court of Dickinson county rendered a judgment and decree of foreclosure in said cause, and made an order of sale of said premises.

There were subsequently several orders of sale issued on said decree, and several appraisements had, each being less than the preceding one, until it was finally sold to T. C. Henry, in March, 1875, for the sum of eight hundred and sixty dollars.

During all this time the assignee made no objection to the proceedings in the State court, nor did he take any steps to foreclose said mortgage, or liquidate the liens in this court. He now files his bill in equity to restrain further proceedings in said State court for want of jurisdiction of the subject-matter in said court.

It is too well settled by a long line of decisions that the Federal courts have general jurisdiction and control of all the assets of bankrupt estates, to be any longer questioned. The defendants, however, maintain that the jurisdiction of

the Federal court is not exclusive, and that the complainant, by making a voluntary appearance as assignee in said suit in Dickinson county, and permitting the proceedings to go on for so long a time without objection, is estopped from now invoking the aid of this court to enjoin the parties.

The defendants also raise a question of limitation, but upon that point I need not express an opinion.

The case resolves itself into this :—

First. Is the jurisdiction of the Bankruptcy Court exclusive in cases of this kind ?

Second. If not exclusive, if the State court had, or can have jurisdiction, should the assignee be permitted now to invoke the aid of this court ?

There seems to have grown up a perplexing and somewhat incongruous line of decisions of different courts upon this question of jurisdiction between the State and Federal courts in matters appertaining to bankruptcy.

While it is almost the universal opinion of all the courts, both Federal and State, that all matters appertaining to the administration or settlement of the estate of bankrupts belong to the Bankruptcy Court, and that parties may be enjoined from proceeding in the State court if its jurisdiction is promptly challenged, it is not so easy to understand the exact grounds on which these decisions rest.

Several of the cases proceed to argue that the United States courts have the exclusive jurisdiction in matters of this kind, and then speak of the State courts having the right to exercise the powers if the Federal court gives its consent thereto.

Now, if the jurisdiction is vested by law in the Bankruptcy Court *exclusively*, how, on any known legal principle, can that court divest itself of that jurisdiction and confer it on any other tribunal ?

It seems to me the jurisdiction must be just where the law has placed it, and it must remain there. Neither the order of the court, nor the consent of the parties themselves, can transfer that jurisdiction to any other court.

As well might it be claimed that the State District Court could send parties into the Probate Court to foreclose a mortgage, or to a justice's court to obtain a divorce, or that parties could by consent give jurisdiction to those courts over such matters.

It seems inexplicable to me, when it is held that the jurisdiction is *exclusive* in the United States court, that it can then be asserted that those courts may exercise it or not, or may transfer it to a State court or not, just as the whim may strike them.

For instance, in the case of *Phelps* v. *Sellick*, 8 N. B. R., 390, Judge Longyear holds that where a mortgagee proceeded to foreclose his mortgage in the State court after the mortgagor had been adjudged a bankrupt, the proceedings were a *nullity*, that is, they were absolutely void for want of jurisdiction, and yet he holds in the same case that the mortgagee might have foreclosed in the State court if the consent of the Bankruptcy Court had first been obtained; and he says, "It is competent for the Bankruptcy Court to treat such process and proceedings as valid and binding upon the estates and persons interested therein."

Then it results, that a judgment absolutely void can be treated by another court as valid and binding upon the estate and persons interested therein if it sees proper to do so. This is what might be called a shifting or transferable jurisdiction. It can be laid off or put on as easily as a mantle. The Federal court can withhold or confer jurisdiction as it may see proper, and the estate and parties are bound thereby.

In re Anderson, 9 N. B. R., 360, the court scouts the idea that an assignee can be sued in a State court concerning the bankruptcy matters; and a decree rendered therein, although by his written consent, is held a nullity.

In the case of *Brigham* v. *Claflin*, 7 N. B. R., 412, decided by the Supreme Court of Wisconsin, the court held that jurisdiction in bankruptcy cases was solely and exclusively in the Federal courts, and uses this language:

"And I cannot but think that Congress has in fact vested in those courts the *complete and exclusive jurisdiction* over all acts, matters, and things to be done under and in virtue of the bankruptcy."

In re Brinkman, 7 N. B. R., 421, the court says, "The jurisdiction of said courts sitting as Courts in Bankruptcy is superior and exclusive in all matters arising under the statute" * * * "Any lien upon the property of the bankrupt, as long as the property is in the possession of the court or its officers, the assignee or trustee, can only be enforced in the District Court sitting as a Court in Bankruptcy."

Then in the same opinion it is said, "No person can enforce a specific lien, such as a mortgage or a judgment in a State court, while the proceedings in bankruptcy are pending, unless an assent thereto shall first be given by the assignee as an officer of the court."

Now, here is a matter said to be vested by law *exclusively* within the jurisdiction of the Bankruptcy Court, and yet the assignee can by consent confer jurisdiction where the law has not given it.

I have referred to these cases more for the purpose of calling attention to what seems to me inexplicable on any legal principle, rather than authority for my decision in this cause; and in giving my opinion in this matter I find myself making an argument for the one side and deciding for the other.

Were there no objectionable cases on this question, and were we compelled to go back to the Bankrupt Act itself for its meaning, I should be compelled to hold the jurisdiction of the Bankruptcy Court exclusive as to all the matters enunciated in the first Section of the act, among which are the adjustment and liquidation of liens, "and all acts, matters, and things to be done under and in virtue of the bankruptcy," etc., etc.

This jurisdiction being exclusive, neither the Bankruptcy Court, nor the parties to the proceedings could divest that jurisdiction, or confer it on any other tribunal, either by consent or by laches, and that all proceedings in the State court

on any of the matters enunciated in said section were absolutely null and void.

That Congress having the constitutional power to establish uniform laws on the subject of bankruptcy, has seen proper to select the Federal courts as the tribunals in which such laws should be administered, and has expressly conferred that power on those courts, and by no implication can the State courts take any of that jurisdiction.

See *ex parte* Christy, 3 How., 292; *Brigham* v. *Claflin*, 7 N. B. R., 412.

The several courts of this State have such powers as are defined by law, and no lawyer would contend that the District Courts of this State have jurisdiction to settle estates of deceased persons because the law has nowhere said that they should not exercise that power. There has been a tribunal brought into existence, and that particular jurisdiction has been in terms conferred upon it, and that of itself is an implied exclusion of that power from other courts.

With this statement as to what my own views of the law would have been, aside from any decisions, I come back to the question as to what has been decided by the courts.

It seems that the general current of authorities, and even those that hold the jurisdiction exclusive in the Bankruptcy Court, agree that the State courts may exercise the power when leave of the Bankruptcy Court is first obtained.

Then there are other decisions which hold that the Bankruptcy Court may approve and ratify proceedings commenced in the State court without leave, if the estate will not be materially injured thereby, or if the assignee has been guilty of laches in objecting to such proceedings. It would seem to stand to reason, if the power can be conferred on the State courts by leave had prior to any proceedings, that it can by the same authority be approved and made good after the proceedings have been commenced.

The following cases hold that the jurisdiction of the United States District Court in matters appertaining to bankruptcy is not exclusive of the State courts.

In re Bowie, 1 N. B. R., 628; *Norton's assignee* v. *Boyd*, 3 How., 426. In this case the Circuit Judge used this language:

"I agree fully in the opinion that upon the ground of expediency the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive, but I do not understand the Bankrupt Law to render it so." The court then holds that parties may foreclose a mortgage against a bankrupt in the State courts, and that the Federal courts will not interfere except to prevent wrong or injustice to the estate.

The Supreme Court affirmed this decision, but declined to express any opinion as to the exclusive jurisdiction of the Federal court.

In *Mays* v. *Fritton*, 11 N. B. R., 229; 20 Wall., 414, a foreclosure of a mortgage was had against the bankrupt in the State court. The assignee was made a party defendant, and entered his appearance and made a contest for the surplus proceeds of the sale, and did not object to the jurisdiction of the court. On appeal to the Supreme Court, it was held that he could not then be heard to object to the jurisdiction, as he had acquiesced in the proceedings in the State court.

A still later case is published in 12 N. B. R., 96, *Scott et al., assignees*, v. *Kelley*. It was a case decided by the Supreme Court, and the opinion is delivered by Waite, C. J. It is very brief, and the substance of it is contained in these words:

"The assignees in bankruptcy voluntarily submitted themselves and their rights to the jurisdiction of the State court. Being summoned, they appeared without objection and presented their claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States.

"It is now too late to object to the power of the State court to act in the premises and render judgment." And cites the case of *Mays* v. *Fritton*, before referred to.

These decisions of the highest court in the land have recognized the power of the State courts to proceed under certain circumstances in these cases, and although it is to be regretted that the views of that court and the reasons for its decision have not been given, it is nevertheless binding upon this court.

As to the other question, it is necessary to say but little.

The assignee voluntarily appeared in the case and submitted to the jurisdiction of the State court, and asked for, and took a judgment in his own favor as an individual, and had his lien adjudicated on the real estate.

He permitted the property to be repeatedly appraised and offered for sale without objection, and was present at the sale and advised about the proceedings therein. The various proceedings have extended over a period of more than two years, and never, until now, has the assignee made any objection thereto. The incumbrances on the real estate are more than it will bring at public sale, and there can be no surplus for the general creditors. There is no reason to believe that the assignee can sell it for more than it has already been sold for, and I cannot see that the estate is now going to be injured by permitting the State court to proceed to a final conclusion of the matter. The temporary injunction will therefore be denied.

SUPREME COURT—NEW YORK.

The claim of a creditor is barred by a discharge, although his name was not placed on the schedule nor any notice given to him of the proceedings.

PLATT v. *PARKER.*

APPEAL by plaintiff from a judgment in favor of defendants dismissing the complaint entered upon the report of a referee.

The action was brought by George W. Platt against William A. Parker and another, upon two promissory notes

indorsed by defendants. Sufficient facts appear in the opinion.

Edward S. Clinch, for appellant.

William A. Jenner, for respondents.

Present—Barnard, P. J., Tappen and Gilbert, JJ.

TAPPEN, J.—The plaintiff sued the defendants as indorsers upon two promissory notes, each for the sum of two thousand five hundred dollars; the defendants pleaded a discharge in bankruptcy granted them on the 20th of December, 1872, under the general Bankrupt Act of 1867, and the amendments thereof.

The trial was before a referee, who found this defense established, and gave judgment in favor of the defendants; the plaintiff appeals therefrom, and claims that such bankrupt discharge does not bar his action, for the reason that the defendants, in their schedules, did not include the claim or the name of the plaintiff in their list of liabilities, and hence, that the plaintiff, as a creditor, is not affected by such discharge. It is admitted as a fact that the bankruptcy schedules, required by the act, did not include the plaintiff's name or indebtedness in question. The marshal or messenger did not serve upon the plaintiff any notice of the proceeding; the notice required by publication was duly given.

The plaintiff offered no proof to show any fraudulent omission on the part of the bankrupts; the defendants were offered as witnesses to testify that such omission was not intentional, but on the plaintiff's objection the referee excluded the testimony. The defendants also put questions for the purpose of showing that the plaintiff had actual knowledge of the bankrupt proceedings during their pendency, and these were excluded on plaintiff's objection.

In the 34th Section of the Act of 1867 it is provided, that any creditor of the bankrupt, whose debt was proved or provable, who shall see fit to contest the validity of such discharge, on the ground that it was fraudulently obtained, may, at any time within two years, apply to the court which granted it, to set it aside.

The same section provides that a discharge, duly granted under this act, shall (with certain exceptions relating to debts created by fraud, and certain other debts) release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proven against his estate, and the certificate of discharge is made conclusive evidence of the fact and regularity of such discharge.

A clause in the Bankrupt Act of 1841, declaring the discharge conclusive, unless impeached for fraud or willful concealment, is not contained in the Act of 1867, and its omission from this latter act is now invoked in the interpretation thereof.

In construing the Act of 1841 the Chancellor, in *Hubbell* v. *Cramp*, 11 Paige, 310, held, that the omission, by mistake of the debtor, of the name or claim of a creditor, could not invalidate the discharge as to such creditor.

Neither the Act of 1841 nor the Act of 1867 requires absolute certainty, either as to the list of creditors or the inventory of the bankrupt's assets. The effect of the Act of 1867, in respect to the question under review, was passed upon in *Payne* v. *Able*, 4 N. B. R., 220; 7 Bush (Ky.), 344. The bankrupt, in that case, had failed to specify the plaintiffs, or their claim, in his bankrupt schedules, and their claims, although provable, had not been proven in the Bankrupt Court; and the conclusion is reached, quoting Shaw, C. J., in *Burnside* v. *Brigham*, 49 Mass., 75, that the mere omission of the creditor's name will not avoid the discharge, but the plaintiff must go farther and show the omission to be fraudulent or willful; the same rule is held in cases decided in other States. (*Brown* v. *Rebb*, 1 Rich., 374; *Beake* v. *Birdsall*, 1 N. J., 12; *Gassett* v. *Morse*, 21 Vt., 627.) And in *Stevens* v. *M. S. Bank*, 101 Mass., 109, the warrant and application for the bankrupt's discharge being published in the newspaper, as required by the act, the creditor not personally served, or whose name is omitted or not known, was held to be bound, at his peril, to take notice. In the Kentucky case the court was of opinion that the discharge could not be re-

viewed collaterally, even on the ground of fraud, but that the remedy was by application to the Bankrupt Court to vacate the discharge, as provided in the act. This rule, however, is not so held in other reported cases, and the courts are not in accord on this question; its consideration is not necessary for the decision of this case.

In the absence of any averment in the complaint, or proof at the trial, that the defendants' omission of the plaintiff's claim in the bankrupt schedules, was fraudulent, we think the discharge bars the plaintiff.

The judgment is affirmed, with costs.

Judgment affirmed.

UNITED STATES DISTRICT COURT—INDIANA.

It is a good defense to a premium note to a mutual insurance company of another State, that the note was given in Indiana to an agent of the company, the company not having complied with the Indiana statute respecting foreign corporations. Mutual insurance companies are clearly within the statute.

A State allowing a foreign corporation to do business within its limits may impose such reasonable conditions as it sees fit.

The order of assessment by the court does not bind the maker as to the validity of the note—his defense to the note can be heard when action is brought upon it.

WILMER S. LAMB, Assignee of the WINNESHIEK INSURANCE COMPANY, v. *MICHAEL LAMB.*

THIS is an action brought by Wilmer S. Lamb, assignee of the Winneshiek Insurance Company, against Michael Lamb. It is averred in the declaration that on the 5th of November, 1863, the defendant executed to said company his premium note, to be paid at such time and in such sums as the Board of Directors might require, to pay losses and expenses of said company; that on the 21st of September,

1871, the said company was duly adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois; that the plaintiff was appointed assignee of the effects of said company; that on the 22d of April, 1873, the said District Court of the United States for the Northern District of Illinois made an assessment upon all the premium notes belonging to said company, to the full amount of said premium notes; and that said defendant had failed, and refused to pay said assessment on his said note.

The fourth plea of said defendant avers that the premium note described in the declaration was taken by one Myron G. Wheeler, on behalf of said company, as agent thereof, in the county of Vigo, and State of Indiana, in consideration of a certain policy of insurance issued to the defendant by said Wheeler as such agent; that said company was created under and by virtue of the laws of Illinois; and that said contract of insurance was entered into, and said note given, at said county of Vigo, and State of Indiana, without said company or agent having in any wise complied with the provisions of an act of the General Assembly of Indiana, respecting foreign corporations.

To this plea there is a general demurrer.

McDonald & Butler, for the plaintiff.

Baird & Cruft, *Voorhees & Carleton*, and *Harrison, Hines & Miller*, for the defendant.

GRESHAM, J.—The 1st Section of the act referred to in the plea declares that agents of foreign corporations, before entering upon the duties of their agency in this State, shall deposit in the clerk's office of the county where they propose doing business the commission or other authority by virtue of which they act as agents.

The 2d Section declares that before doing any business in this State said agents shall procure and file with the clerk of the Circuit Court of the county where they propose doing business a duly authenticated order or resolution of the Board of Directors of such corporation, authorizing citizens of

this State having demands arising out of any transactions in this State with such agents, to sue for and maintain an action for the same in any court of competent jurisdiction in this State, and for that purpose authorizing service of process on such agent to be valid service on such corporation.

The 3d Section declares that service of process on such agents shall be deemed service on the corporation.

The 4th Section declares that foreign corporations shall not enforce in any courts of this State, any contracts made by their agents before compliance with the provisions of Sections 1 and 2 of the act.

The 5th Section declares that any person who shall directly or indirectly recover or transmit money or anything of value to or for the use of such corporation, or who shall in any manner make or cause to be made any contract, or transact any business for such foreign corporation, shall be deemed an agent of such corporation.

The 6th Section declares that "Section 5 shall not apply to persons acting as agents for foreign corporations for a special or temporary purpose, or for purposes not within the ordinary business of such corporation."

The 7th Section declares that any person so acting as agent of any foreign corporation without first complying with the provisions of this act, shall be fined in any sum not less than fifty dollars.

The language of this statute is clear and free from ambiguity. In such cases there is no room for construction. All corporations created in other States are included. (*Rising Sun Insurance Company* v. *Slaughter*, 20 Ind., 520.)

The evident object of the act was to protect the people of this State against irresponsible foreign corporations and their agents, and to provide those having demands against such corporations, growing out of the usual and ordinary business transacted by them or their agents in this State, a cheap and speedy remedy in their home courts, without being driven to foreign and distant jurisdiction.

Experience seems to have demonstrated the necessity for legislation of this character in most of the States. The power of the States to execute such laws is no longer seriously questioned.

Corporations are mere creatures of local laws, and must therefore dwell in the place of their creation. In the absence of such laws as the statute under consideration they may enter the territory of other States and make contracts within the scope of their limited powers, for there is then an implied assent to their thus migrating. Having no absolute right to recognition in other States without their assent, it follows that such assent may be granted on such reasonable conditions as the State assenting may in its discretion see fit to impose. (*Hoffman* v. *Banks*, 41 Ind., 1; *Union Central Ins. Co.* v. *Harrah*, 47 Ind., 236; *Rising Sun Ins. Co.* v. *Slaughter*, 20 Ind. 520; *Washington Co. Mutual Ins. Co.* v. *Hastings*, 84 Mass., 398; *Williams* v. *Cheney*, 74 Mass., 206; *Paul* v. *Virginia*, 8 Wall., 168.)

But it is argued that the taking of the defendant's premium note and issuing to him his policy were acts within the exception of the 6th Section of the act; that in taking the note and issuing the policy, Wheeler was an agent "for a special or temporary purpose," and for a "purpose not within the ordinary business of such corporation."

In support of this position I am referred to the case of *Payson, assignee, etc.* v. *Withers*, 5 C. L. N., 445. The cases are clearly distinguishable. That of *Payson* v. *Withers* was brought to recover on a subscription made in this State for stock of an insurance company of another State. This is an action on a premium note made in Indiana, the consideration for which is a policy issued by a mutual company of another State.

In the former case, the learned Circuit Judge said that the subscription to the capital stock "was not the ordinary business of the corporation; that it was an act preliminary to the commencement of its business; that when the stock subscriptions were made, and the corporation was set in mo-

tion and made to perform its functions, then the ordinary business referred to by the act began—the issuing of policies of insurance and performing the general and other business connected with such corporations."

But mutual insurance companies have little other business than the issuing of policies, taking premium notes, receiving cash premiums, and adjusting and paying losses. Certainly, the issuing of policies and taking premium notes is not only their "ordinary business," but their principal business.

If the position of the plaintiff be correct, it follows that mutual insurance companies are not embraced in the act at all. Such a construction would violate the plain letter of the statute. No good reason can be assigned for any such legislative exemption which would not apply with equal force to stock insurance companies. It can hardly be said that experience has shown the superior solvency or value in any other respect of insurance companies organized on the mutual system; and a comparison would perhaps prove the difference to be in favor of the stock companies. Certainly, whatever protection the Legislature designed to afford the citizen was in sound reason as much demanded against the one class of insurance companies as against the other.

It is further insisted that the defendant is precluded from making this defense by the judgment of the court which made the assessment on the premium notes. The order of the court has the same force as an assessment made by the company, with this exception, that the makers of the premium notes will not be allowed to dispute the correctness of the amount of the assessment as made by the court. The order of assessment was made without personal service, and the notice given to policy-holders by publication was general, without naming them. It will readily appear that in making such orders it is not possible for courts to hear and decide upon all the various defenses which a numerous body of policy-holders might be justly entitled to present, as for example, *non est factum*, surrender and acceptance of the policy,

that the note was obtained by fraud, or was made in violation of law, as in this instance. These defenses can and ought to be heard when actions are brought for the recovery of the premium notes.

I am clearly of the opinion that the act of the Legislature was directed against foreign mutual insurance companies as well as against foreign stock insurance companies; and that the premium note declared on was taken in violation of law, and is therefore void.

The demurrer will be overruled.

UNITED STATES DISTRICT COURT—DELAWARE.

A residuary bequest directing certain real estate to be sold to the best advantage, and continuing as follows:—"and all the remainder of my estate, real, personal, or mixed, and the proceeds thereof, * * * I do give and bequeath to my daughters," etc., held to entitle one of the residuary legatees, a married woman, only to money, the proceeds of sale, and not to a share of the stocks (which constituted a portion of the residue), disencumbered, by force of the married woman's Act of 1865, from the marital rights of the husband.

A legacy to a wife of a share of the residue of her father's estate, including the proceeds both of land and stocks, directed to be sold, does not constitute a separate estate in the wife, under the Delaware Statute of 1865; and such legacy having been reduced to possession by the husband, a note and check afterwards given by him to his wife for the proceeds thereof, are nullities, and cannot be proved by the wife against the estate of her husband in bankruptcy.

Such note and check do not constitute a trust or gift in favor of the wife, nor are they sufficient evidence to support a trust, though the note bears an indorsement (assumed to be made by the husband) to the effect that the note was given for money accruing to the claimant from her father's estate.

Quere. Whether the doctrine of the wife's equity extends so far as to enable her to restrain her husband from proceeding at law to collect her *chose in action*, until he makes a provision for her?

The right of a wife to have interposed by bill in equity to prevent her husband from reducing to possession her *chose in action* by proceedings at law—even conceding such right to be established by the authorities—held insufficient to support a promise by the husband, to pay to the wife a sum equal to the proceeds arising from the sale of the wife's legacy, where the promise was made subsequently to its reduction to possession by the husband.

The doctrine of the wife's equity to a settlement, has no application to a case where the husband has reduced to possession a legacy to the wife, without legal process, and with her assent.

In such case, there is no consideration to support a promise subsequently made, to pay to a wife a sum of money equal to the amount received from the legacy.

On the hearing of a motion to expunge a proof, the moving party is entitled to open and close.

If the testimony of the bankrupt is desired on a motion to expunge a proof, he should be summoned as a witness.

The answer to a petition to expunge a proof cannot be used as evidence.

The papers annexed to an answer to a petition to expunge a proof, can only be used as evidence by being proved in the usual manner.

WILLIAM CANBY, Assignee in Bankruptcy of JOHN McLEAR and SON, v. *AMELIA F. McLEAR.*

PETITION to expunge proof of claim.

The facts sufficiently appear from the opinion of the court.

Several questions of practice were raised and decided at the hearing, viz.:

First. The court held that as the proof stood as a *prima facie* claim on which a dividend would be paid, unless some proceeding was taken to impeach it either in law or fact, the burden of showing that it was not a proper claim rested upon the assignee, and entitled him to the opening and reply.

Second. Upon affidavit of the claimant filed, application was made by her counsel for an order for the examination of John P. McLear, one of the bankrupts, and husband of the claimant, under Section 5086, United States Revised Statutes. The record disclosed the fact that no subpœna had been issued for him. The court denied the motion, and remarked, that if an examination of John P. McLear were desired with respect to the present hearing, he should be summoned as a witness. John P. McLear was then offered as a witness, but objection being made to his competency, he was withdrawn without a decision being had upon the objection.

Third. Claimant had annexed as exhibits to her answer to the petition, certain papers which were sought to be treated in the argument, supported by her affidavit to the answer of her counsel as proofs. Upon objection made, the court ruled, that neither the answer nor any papers annexed to it could have any effect as evidence; that the answer was a voluntary affidavit, operating only as a plea

traversing the allegations of the petition, and could not be used as evidence for the claimant, though she bound herself by any admissions of fact contained in it; and that the papers annexed to it could only be made evidence by being proved in the usual manner, subject to the right of cross-examination.

George H. Bates, Esq., and *Edward G. Bradford, Jr., Esq.*, for the assignee.

Benj. Nields, Esq., for the claimant.

BRADFORD, J.,—Amelia F. McLear, the claimant, is the wife of John P. McLear, one of the bankrupts, and is and was at the time of making proof of her claim, the mother by him of three children, now living. Her claim is based, 1st, upon a certain promissory note, which reads as follows:

$2955.54. Wilmington, Del., January 1st, 1867.

Six months after date I promise to pay to the order of Amelia F. McLear, at the first National Bank of Wilmington, Twenty-nine hundred and fifty-five dollars and fifty-four cents, without defalcation, for value received.

JOHN P. MCLEAR."

and, 2d, upon a check for nine hundred and eight dollars and four cents, drawn by John P. McLear in favor of the claimant, January 1st, 1867: which check it is alleged was lost or mislaid, and could not be produced at the time of the proof of her claim. The two sums above-mentioned, with legal interest, constitute the amount of the claim filed.

Thomas C. Alrich, the father of the claimant, died in June —, 1865, leaving a last will and testament, by which he made provision for his wife and children. The clause in the will which bears upon the question presented is as follows: "And as my dwelling-house and lot would amount to more than I could give to any one of my children, I direct my executors to sell and dispose of them to the best advantage, and all the remainder of my estate, real, personal, or mixed,

and the proceeds thereof, including the amount of the mortgage and bank stocks reserved for my wife, I do give and bequeath to my daughters, Elizabeth D. Porter, Susanna C. Bush, Adaline G. Besson, Harriet S. Clark, Amelia F. McLear, and my son William A. Alrich, or their heirs or assigns, to be equally divided among them, share and share alike * * * * I do hereby nominate, constitute, and appoint my two sons-in-law, William Bush and John P. McLear, the executors of this my testament and last will." The will was duly proved, and William Bush and John P. McLear were duly qualified as the executors thereof. The estate of the deceased embraced, among other property, sundry stocks, which were not sold by the executors, but were divided among the parties entitled to receive the same. The bequest to Amelia F. McLear was not a specific legacy, nor was it a demonstrative legacy, to be paid out of a specific fund pointed out for that particular purpose; but it was a general pecuniary legacy to be paid by the executors, who were directed to sell real estate and personal estate, including the stocks etc., to raise the moneys thus to be distributed according to the terms of the will. There was no trust raised by the will in favor of the claimant, nor was any separate estate given to her by the will, in opposition to the marital rights of her husband.

The law of the State of Delaware at that time created no such separate estate; for this bequest did not come within the provisions of the Act of 1865. That act provides, "That the real estate, mortgages, stocks, and silver-plate belonging to any unmarried woman at the time of her marriage, or to which she may become entitled at any time during her coverture, shall remain and continue to be her sole and separate property, and shall not be subject to the disposition of her husband, etc." It was claimed by the counsel for the claimant, that she was entitled, under the will, substantially to a share of these stocks ordered to be sold; that they constituted the substance of value which was intended by the testator to be given, and by a fair and liberal construction,

should be considered as that which was given ; and that consequently the claimant, under the laws of Delaware, was entitled to shares of stock, or the proceeds of their sale, disencumbered from any marital rights on the part of her husband. The court cannot take this view of the case. Money was here the precise subject-matter of the bequest, and the construction of the statute even in doubtful cases must lean to the support of the common law rights of the husband. Although the will of Thomas C. Alrich directed these stocks to be sold by the executors, and the proceeds thereof to be divided among the various legatees therein named, no sale was made by the executors, but by consent of the parties interested, the stocks were divided in kind among the parties entitled to receive the same; John P. McLear having had transferred to himself in his individual name on the books of the respective companies the shares which his wife would have taken, had he not asserted his marital rights to take them into his own possession. He also received into his possession, as his wife's share of the cash in the hands of the executors for distribution, the sum of nine hundred and eight dollars and four cents. Amelia F. McLear could not have validly claimed these stocks, for they were not bequeathed to her, or in trust for her; nor was there any act or consent needed from her to invest her husband with full power to take possession of the stocks, for, they having been substituted for money by consent of all the parties capable of giving consent, he was the proper person to take possession of them. John P. McLear subsequently sold the stocks which he had received on account of his wife's legacy, for the sum of two thousand nine hundred and fifty-five dollars and fifty-four cents. Thus, having not only become possessed of these stocks, but also having converted them into money, and having received the above-mentioned sum of nine hundred and eight dollars and four cents, John P. McLear reduced the legacy, or *chose in action* of his wife, into his absolute possession and control. And this is not all; for he completely converted it to his own use by reason of

his putting most of this money into his own business operations as a banker, and the rest into a dwelling-house purchased in his own name, and for his own use and benefit. There can therefore be no dispute as to the fact of conversion to the husband's use. It is true that mere possession is not conclusive evidence of conversion by the husband; but in this case, so far as we have considered it up to this point, there was a complete appropriation to his own use and benefit, without the slightest intimation so far of any intention that his wife should have a separate interest in the moneys, or the stocks, or the fund produced by them.

On the 1st of January, 1867, some nine months, on an average, after the moneys arising from the sale of the stocks which had been transferred to John P. McLear, were received by him, and a considerably longer period after the above-mentioned sum of nine hundred and eight dollars and four cents had been received by him, the note and check in question were given. Assuming now, for the purposes of argument, that the words written upon the back of the envelope annexed to the answer of the claimant were in the handwriting of John P. McLear, and related to the shares of stock which he had received, and to the check for the nine hundred and eight dollars and four cents also received by him; and assuming further the genuineness of the handwriting on the back of the promissory note for two thousand nine hundred and fifty-five dollars and fifty-four cents, and waiving any objections which might justly be made to the deficiency of proof of the loss of the check, and that proper and diligent search had been made therefor, what are the equitable rights of Amelia F. McLear in the premises, in the enforcement of which a court of equity should assist her, growing out of the execution and her possession of the note and check?

The writing on the envelope contains these words, "Certificates of stocks belonging to Amelia F. McLear" and "J. P. McLear's check for nine hundred and eight dollars and four cents," and also other words pointing to the time when, and the persons to whom John P. McLear sold some

of the stock. The writing on the back of the promissory note is as follows: "This note is for money accruing to my wife from her father's estate. It has been invested by me in my business, except nine hundred and eight dollars and four cents which I put into my dwelling, No 709 French street." Are these expressions and words, together with the other facts in the case, sufficient to entitle Amelia F. McLear to the claim she has made? The fact is beyond question, that a complete conversion of the stocks and moneys, both in point of fact and in point of title, had been made. The written statement on the back of the note above-mentioned is conclusive upon this point. All the declarations of John P. McLear in writing upon the envelope and the note, cannot alter or in any way affect the established fact that, long before this note was given, or the writing made upon the envelope, John P. McLear had converted to his own use the moneys arising from the property which represented the share of Amelia F. McLear in her father's estate. It may be, and we think, from the fact that John P. McLear several times spoke of the stocks and moneys as belonging to his wife, it is probably true, that he intended to make, and believed he was making some kind of provision for his wife, at least that he thought he was entering into a contract, which he hoped to have executed at some future time.

Of what value to Amelia F. McLear were this note and check? Amelia F. McLear was a legatee of her father, Thomas C. Alrich. Had John P. McLear been under the necessity of applying to a court of equity for assistance in obtaining this legacy, the court would not have granted it without his making a suitable settlement on his wife;—and even admitting the correctness of the law contended for by the claimant's counsel, that a court of equity would go so far as, upon the wife's application, to restrain the husband from proceeding in a court of law for the recovery of his wife's legacy, until he should make a suitable provision for her;—John P. McLear has not brought himself within either of these cases. He obtained the legacy without legal process and converted

it to his own private use, and as it appears, with the consent of his wife. The real question is, will such a contract by a husband with his wife, made long after the legacy has been not only reduced to possession, but converted to the use of the husband, be valid? Every executory contract must be based on a consideration—no matter whether this contract be made between married persons or not—and the main question here to be decided is, was there any consideration for the note at the time it was given? There was none; for she had no separate estate to give to her husband as a consideration for the note; it was all gone, used, diverted into new channels. He required no aid at her hands to enable him to enjoy to the full his marital rights with respect to this legacy. None of the circumstances (which control many of the cases cited) of aid by the wife, necessary to the successful prosecution of her rights by the husband, occur in this case. And the claimant is driven to this position, that, as she had a right, if she had seen fit to exercise it, to have restrained her husband by a bill in equity, from proceeding at law to recover the legacy, had it been necessary for him to do so, this option to refuse her assent to his recovering this legacy, had it been necessary for him to go into a court of law for that purpose, constituted in itself a valid consideration for the note given by John P. McLear to his wife. Many and conflicting cases were cited, to show what is the law in this country as to the power of the wife to restrain her husband, by bill in equity, from proceeding at law to recover a legacy, or *chose in action* bequeathed her. An extended examination of authorities on this point would involve too much time and labor, since it is unnecessary to the decision of this case. It must be conceded, however, that New York authorities and others in this country assert this right in favor of the wife—and if this question were presented, this court would have to decide between the more modern cases, enlarging the sphere of the rights of married women, and those which stand by the ancient landmarks, and rest upon the antiquated idea that separate and conflicting interests in

one household do not conduce to domestic harmony and unity. This question, however, need not be examined, for we have already said that no such case was presented to this court—and the probability that Amelia F. McLear might have enjoined her husband, had it been necessary for him to sue for the legacy in a court of law, cannot create a consideration for this note and this check. No court has gone to such a length. Such a decision would overthrow all the settled law on the subject of enforcing voluntary executory contracts in a court of equity. The nearest case to this presented is that of Estate of Benj. Hinds, 5 Whart., 138, in which Chief Justice Gibson held, that a certificate of a husband, that he had borrowed money of his wife and promised to pay the interest to her annually, furnished sufficient evidence that he held the money as trustee for the wife, and not in his own right. It will be observed that case differed from this in two particulars—1st, the question was between the wife and the representatives of the husband; and, 2d, he received from his wife the money which was in her own possession, so that he had not as yet reduced it to his own possession. Had the case there been between the creditors and the wife, and had Hinds had the money in his possession, and used and invested it before making this certificate of loan and promise to pay interest thereon to his wife, it would then have been in point. This is a strong case to show what will amount to a declaration of trust—and it could have been decided on no other principle than that there had not been a conversion of the *chose in action*, and that this act was evidence that he did not intend to convert it; and his promise to pay interest on the sum loaned, was to be fairly construed as a declaration of trust. Indeed, the Chief Justice says in this very case, that the certificate of loan and promise to pay was worthless as a promise from a man to his wife.

In *Tritt's Administrator* v. *Colwell's Administrator*, 31 Penn. St., 228, Judge Strong, now of the Supreme Court and presiding judge in this circuit, who gave the opinion of the court, on page 234 says: "An actual use of the wife's *chose*

in action for his own purposes works a transfer of her ownership"—a terse and admirable statement of the law as applicable to this case. In *Woodworth* v. *Sweet*, 51 N. Y., 8, the same principle is laid down by Judge Leonard, in the commission of appeals. This also was a case of retention by the wife of the separate estate, and borrowing by the husband. And he says a "promise to repay money so borrowed by the husband cannot be regarded as *nudum pactum*. The equity to have a settlement made on her constitutes the valuable consideration for the note." Now, in this case before the court, there was and could be no equity for a settlement to Amelia F. McLear when the note and check were given, for, in the language of Justice Strong, "there had been an actual use of the wife's *chose in action* for his own purposes" by John P. McLear, so that the equitable right was destroyed, and could not be the basis of any consideration for the note and check.

The case of *Jaycox et al.* v. *Caldwell*, 51 N. Y., 395, is a like case, in which the promise to pay is based on the consideration of the wife having loaned to the husband her own estate in her own possession. The case of *Riley et al.* v. *Riley*, 25 Conn., 154, is not in point; the notes given were in consideration of money borrowed by husband before marriage, and the husband said if she would not proceed to collect them against him, they would be good against his estate, and he directed her to keep the notes. The court held that this was in the nature of an ante-nuptial settlement. I can find no case where there has been an absolute conversion of the property, in which a promise to pay back money obtained from the separate estate of the wife is considered valid. If there is such a case, it is in the teeth of all the well-settled principles of equity governing such cases. There is, however, one case, *Turner* v. *Nye*, 89 Mass., 176, which is in many points identical with this before the court. A note was given by the husband to the wife for the proceeds of sales of lands coming by descent to the wife; and another note for moneys received from trespass on lands of wife, and these notes were delivered to the wife; the husband made

memoranda on notes, showing from what source the money was received, and that the money was used to build his dwelling-house, and at the time of delivery made the declaration that they belonged to her, and afterwards, when giving her money, paid it as interest money—yet the Supreme Court of Massachusetts would not hold his estate liable in equity for the payment of these notes after the husband's death. The court would not consider these notes as declarations of trust, and bases the decision on the special ground that there had been a complete conversion by the husband before the notes were given. This case is direct authority on the point, that this note and check could not be upheld as a gift; it could not be the subject-matter of a gift, even if a perfect delivery and separate possession had been proven; and it is also direct authority on the point, that as a note or contract as between man and wife it is utterly void.

It will be observed that in *Turner* v. *Nye*, "at or about the time of receiving the money" by the husband with the consent of the wife, the notes were given, so that the case is not so strong as the one before the court, where the conversion was nine months old before the existence of the note or check. The court regrets that the law will not permit the payment of this claim; as doubtless it was the *bona fide* intention of John P. McLear that his wife should be secured at some future day in this amount. Had he registered these stocks in the name of his wife; had he placed the money in the hands of a third party for her use; had he given her exclusive possession of the note or bond of a third person; had he allowed her to receive the stocks and money arising from their sale, and then borrowed from her and given his note, there might be ground for relief. But as it is, John P. McLear did nothing but give his promise to his wife, who was not capable in law of receiving it or profiting by it. It is to be regretted that Amelia F. McLear cannot be admitted on common and equal grounds with other creditors; but the court does not see how it can be done consistently with the decisions controlling such causes. The claim must, therefore, be stricken off. Let such an order be entered.

UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

The United States need not prove its debt before filing a bill to enforce its right to priority of payment.

The United States is entitled to priority of payment out of the separate estates of the partners, although its demand is against the firm.

The rule that the joint estate must be applied to pay the joint debts, and the separate estate to pay the separate debts, is only applicable where the joint estate as well as the separate estate is before the court for distribution.

If the United States holds a demand against a firm, some of the partners of which reside in a foreign country, and the resident partners become bankrupt, it is entitled to priority of payment out of their separate estates.

The United States may enforce its right to priority without first exhausting the securities it may hold for the claim.

UNITED STATES v. *EDWIN M. LEWIS et al.*

THIS case was argued at a session of the Circuit Court at Erie, before Judges Strong and McKennan.

Wm. McMichael and *Mr. Murtree*, for the plaintiff.

Sam'l Dickson, on the same side for the bankrupts.

R. L. Ashurst and *W. P. Clough*, for Edwin M. Lewis, trustee.

STRONG, J.—The bill and answer, together with the cross-bill and answer thereto, reveal the following state of facts.

On the 25th day of September, 1873, the London firm of Jay Cooke, McCullough & Co. were indebted to the United States in the sum of one hundred and thirty-two thousand six hundred and ten pounds, nine shillings and eight pence sterling, and the debt remains unpaid. Of that firm, there were at the time mentioned ten partners, three of whom are residents in London, England, and the other seven are residents in the United States. The seven resident here, were also partners in the firm of Jay Cooke & Co.

On the 25th of September, 1873, a petition in bankruptcy was filed against the firm of Jay Cooke & Co., and on the 26th of November next following, the firm and its members were adjudicated bankrupts. Subsequently, Edwin M. Lewis, the principal defendant, became the trustee under the 43d Section of the Bankrupt Laws. There is in the hands of the

trustee a large amount of assets, which belonged to the bankrupt firm, and also a large amount of cash and other property, real and personal, which was the separate property of the several partners of the firm. In view of this state of facts, the bill was originally filed. Its object is to subject the separate property of the bankrupt partners to the payment of the debt due to the United States from Jay Cooke, McCullough & Co., in preference to all other debts due, either by the bankrupt firm, or by the individual partners, and it rests upon the assumption that as members of the London partnership, the bankrupt partners are debtors to the United States, each being liable for the amount of the indebtedness.

The facts thus stated are substantially admitted by the answer to the original bill, but it is averred that Jay Cooke, McCullough & Co. are not bankrupts; that they have assets in this country, and in England; that McCullough, one of the partners of the firm, resident in England, has separate property in the United States; that the firm has pledged to the United States a large amount of securities and other property for the protection of the debt now claimed, and that the United States assert a right to apply these securities and other property to the payment of a debt subsequently contracted by the three non-bankrupt partners. The answer does not deny, that generally the United States has a priority of claim against the estates of bankrupt debtors to it, over other creditors, but to evade the application of this acknowledged right to the present case, it presents several considerations, most of which are merely formal, requiring little notice. They are, briefly stated, thus:

First. That there is a large debt claimed to be due by Morehead, one of the bankrupts, which, if valid, is sufficient to absorb all the balance of his separate estate in the hands of the trustee.

Second. That the bill does not aver Jay Cooke, McCullough & Co. to be insolvent.

Third. That the balances due to the firm by the partners respectively are not stated.

Fourth. That the bill avers no demand on the three solvent partners, nor refusal, nor inability on their part to pay the debt claimed.

Fifth. That by a rule in equity, the private estates must first pay the private debts, and the surplus only can be applied to the firm debts.

Sixth. That the surplus of the separate estates should be apportioned among the creditors of the several firms, of which the partners were members, and that the claim of the United States can extend only to so much as the creditors of Jay Cooke, McCullough & Co. would be entitled to out of the private estates of the partners.

Seventh. That a declared insolvency of Jay Cooke, McCullough & Co. is necessary to give to the United States a priority over creditors whose rights became vested by the bankruptcy.

Eighth. That the United States have not proved their claim, and that there is no jurisdiction in this court.

Ninth. That the remedy of the plaintiff is at law.

Tenth. That the collaterals held by the plaintiffs should be first applied, or, if not, that the trustee should be subrogated.

Such are the defenses set up. In addition, the defendant Lewis has filed a cross-bill for the administration of the collaterals in the hands of the United States, and for an account of the assets of Jay Cooke, McCullough & Co. In the present stage of the case, however, it is unnecessary to devote much attention to the cross-bill, or to the answer made to it, for they can have no bearing upon the question we are now asked to consider. It is sufficient to say, that in the answer, the United States submits to account for the collaterals when the debt for which they were pledged shall be paid, but denies that there is any obligation to resort to the collaterals before claiming against the separate estates of the bankrupts. The answer also avers, that the securities were pledged to secure a subsequent debt due the United States, for which the bankrupts are not liable, the debt having been

incurred, and the pledge made after the petition in bankruptcy was filed, and before the firm was dissolved by the adjudication.

There are other averments in the answer which need not now be noticed. The cross-bill relating solely to the administration of the collaterals, cannot affect in the least the right of the United States to an immediate decree for satisfaction of the debt, out of the private estates of the bankrupts, if the trustee has only a right to subrogation or redemption, on payment of the debt for which the collaterals were pledged. And that he has no greater right is very plain. The administration of the collaterals is a subsequent matter. The present question therefore is, whether in view of the bill and answer, the plaintiffs are entitled to an immediate order for the payment of the debt due them, out of the separate estates of the bankrupts, in preference to the claims of the other creditors.

The Act of Congress of March 3d, 1797, re-enacted in the Revised Statutes (Section 3466), gives priority of payment to the United States in all cases of the insolvency of the debtor. Its provisions are that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." Now, that the bankrupts who were partners in the firm of Jay Cooke, McCullough & Co., are not only insolvent, but that they are debtors to the United States in the sum of one hundred and thirty-two thousand six hundred and ten pounds, nine shillings and eight pence sterling is shown by the pleadings and by the admitted facts.

True, the debt was incurred by the firm of which they were members, but it is not on that account any the less the debt of each member of the firm. The liability of members of a partnership to its creditors differs in no essential particular from that of other joint debtors. It is true the joint effects of the firm must be applied to pay the joint liabilities, for such is the legal effect of the partnership agreement. The right of a single partner extends only to an account, and to a share of what remains after the debts have been paid, and his separate creditors can have execution of no more than is his. The inability of separate creditors of a partner to seize partnership property for the payment of his separate debts, has therefore no tendency to show that each member of a firm does not owe the debts due by the firm. And it is well settled by judicial decision affirmatively, that each partner is a debtor to the creditors of the firm. If he be sued at law for a firm debt, without a joinder of his copartners, he must plead the non-joinder in abatement, or the creditor will be entitled to a judgment against him individually. So, if judgment be recovered against a firm, execution may be levied upon the separate estate of any of the partners. Equity also, as well as law, regards each partner as a debtor to creditors of the firm, a joint debtor with each of his copartners; and that the estate of a deceased one of several joint debtors may be proceeded against in equity without regard to the solvency of the surviving debtors is no longer to be doubted. (*Thorpe* v. *Jackson*, 2 You. & Coll., Exch., 553.) Numerous other decisions have been made to the same effect. *Wilkinson* v. *Henderson*, 1 Myl. & K., 582, was a case of partnership where a deceased partner's estate was held liable immediately for the firm debts, without averment of insolvency of the surviving partners; and the court, after pointing out that either the creditor must be required to exhaust his remedies against the survivors, or that the executors of the deceased must be required to demand the balance on settlement of the firm accounts, concluded that the latter is the sound rule. Such is also the doctrine of *Nelson* v. *Hill*,

5 How., 127, and that asserted in Story on Partnership, 362, note 3.

And the rule is not different in bankruptcy. Creditors of a firm have been allowed in some cases to prove their claims against the separate estate of a bankrupt partner. Whether such creditors are permitted to share ratably with the separate creditors or only to come upon that portion of the estate which remains after the separate creditors are paid, is immaterial to the present question. It is sufficient that they are allowed to prove their claims. The Bankruptcy Court acknowledges them to be creditors of the bankrupt partner, though in marshaling the assets it may give priority to the separate creditors.

The case then, as presented, is this: The seven partners of the firm of Jay Cooke, McCullough & Co., who are resident in the United States, and who were also partners in the firm of Jay Cooke & Co., are severally, as well as jointly with others, indebted to the United States, and they are insolvent. The defendant Lewis has in his hands a large amount of money and other property, which was the separate estate of these debtors, which he holds in trust for the payment of these debts. Why then is not the exact case before us which was contemplated by the Act of Congress, which gives to the United States priority of right over the claims of other creditors? The statute gives that priority without exception. It attaches to all debts due to the United States, whether they be joint or several; whether they be legal or equitable. It postpones all debts due to others, no matter what their character may be. True, the priority of the United States does not override any liens upon the debtor's property which existed before the event occurred which gives the statutory priority, that is, before the insolvency. *Conrad* v. *Atlantic Ins. Co.*, 1 Pet., 438; *Brent* v. *The Bank of Washington*, 10 Pet., 596. The reason for this is obvious. The claim of the government extends only to that which was the property of the debtor when he became insolvent, and his property is only that, in substance, which remains after

the satisfaction of liens upon it. His power of disposition extends no farther. The lien is paramount to his right. But there are no liens in this case to interfere with the priority of the United States. None are asserted. The proceeding in bankruptcy transferred the estate of the debtors to the trustee, just as it was when the act of bankruptcy was committed. Conceding that it created a trust in favor of the creditors, it is a trust for the payment of debts, and the trustee holds as well for the United States as for the other creditors. It creates no vested interests in the other creditors superior to those of the government. On the contrary, under the statute, the trust in favor of the latter must be paramount. In *Beaston* v. *The Farmer's Bank of Delaware*, 12 Pet., 102, it was decided to be the operation of the Act of 1797, that whenever the debtor is divested of his property, in one of the modes stated in the act, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay the United States first out of the proceeds of the debtor's property. And the Bankrupt Act has wrought no difference. It has not repealed the Act of 1797, and the United States are not subject to its provisions. (*United States* v. *Herron*, 20 Wall., 251.) Certainly, the Bankrupt Act has given to the creditors of a bankrupt no lien on the assigned property which can interfere with debts due to the United States. The right to priority of payment is a legal right, not a merely equitable one. It is called into existence by the bankruptcy of the debtors, but it is not created by the Bankrupt Act. If then there is no lien upon the property in the hands of the trustee, no lien held by or for the other creditors of the individual partners of Jay Cooke, McCullough & Co., who are bankrupts, why must not the debt due to the United States be first paid? This question leads to a consideration of the defenses set up in the defendant's answer. They are all equitable, and, in our judgment, most of them are quite immaterial, needing no discussion. That there are other creditors of one or more of the debtors whose estate is

in the trustee's hands; that the bill does not aver the insolvency of Jay Cooke, McCullough & Co.; that it does not state the balances due to the firm by the partners respectively, nor aver any demand on the three solvent partners, or inability on their part to pay the debt due the United States; or that the claim of the United States has not been proved under the Bankrupt Law; none, or all of these things can possibly affect the right now claimed by the plaintiffs, and they have not been urged in the argument. The defense is vested mainly upon the equity rule that in marshaling the assets of a firm, and those of the members of the firm, in case of insolvency, partnership creditors are entitled to the joint property, to the exclusion of separate creditors of the partners, and separate creditors are entitled to the separate property in preference to creditors of the partnership. It is said the United States is a joint creditor, and, therefore, that the private estates of the separate creditors of the several partners, now in the hands of the trustee, must, under the rule, be applied first to the payment of the individual debts of the partners respectively. The existence of the rule in equity, as well as in bankruptcy, may be conceded; but, for several reasons, it is inapplicable to such a case as we have before us. It was introduced at first, and it is continued professedly to promote equality of distribution. But the statute giving priority to the United States is intended to prevent such equality. How, then, can an equity rule, designed to secure equality, prevail against a statute, the purpose of which is to destroy it? How can a claim preferred by an Act of Congress absolutely, without exception or qualification, be postponed to the claims of other creditors by force of an equitable maxim never intended to be applicable to the case of a claimant who has a superior right by law? If, therefore, this were a case in which the United States could be regarded as a joint creditor of the bankrupt partners, claiming against the separate creditors of those partners, no court would be at liberty to deny effect to the statute. But the facts exhibited do not present such a condition of things as to enable

the defendant to invoke the application of the rule independently of the statutes. The rule is applicable only where the joint estate as well as the private estates of the insolvent partner is before the court for distribution, and where there are joint creditors and also separate creditors of the individual partners. Here the two funds before the court are the joint property of Jay Cooke & Co., and the separate property of the members of the firm. Over the property of Jay Cooke, McCullough & Co., the court has no control. The United States are not creditors of Jay Cooke & Co. They have no claim upon the joint fund within the power of the court, and they cannot be remitted to it. All they can reach of that, is the individual shares of the partners in what may remain after the payment of the joint debts of that firm, if anything shall remain. If they cannot reach the private property, they can obtain nothing. If they were creditors of Jay Cooke & Co., the rule in equity might be invoked were it not for the Act of Congress, and so also, if the property to be marshaled were the joint property of the London firm, and the private property of the partners. But under the facts of the case, and in view of the unqualified provisions of the statute, we think the equity rule relied upon by the defendant has no applicability to it. Entertaining this opinion, it is unnecessary to discuss this ground of defense more at length.

That the United States are not under obligation to make use of the collaterals, and apply the proceeds thereof to the satisfaction or reduction of the debt claimed, before asserting a right to the fund in the trustee's hands, is very plain. That might be their duty if they were bound by the Bankrupt Law; but, as we have seen, they are not. They would not be even if they had proved their debt. (*Harrison* v. *Sterry*, 5 Cranch, 289.) And independent of the provisions of the Bankrupt Act, no creditor can be compelled to make use of the collaterals he may hold as a security for the debt due him before resorting directly to his debtor. This assertion is abundantly sustained by authority. The answer to the cross-bill avers that the collaterals were pledged for

another debt. This, indeed, is not an admitted or established fact, but if it is a fact, clearly the trustee has no right to insist on a resort to the collaterals. And if it be not a fact, the utmost right he has is to subrogation after the debt is paid. Even a surety cannot compel the creditor to resort in the first instance to the estate of his principal. He has no right in equity until he has himself performed equity by paying the debt. The bankrupt partners in this case are not even sureties. They are principal debtors. What a surety cannot do, is certainly beyond their power, and if they cannot require the United States to sell the collaterals before payment of the debts, or to resort primarily to their co-debtors, the solvent partners of Jay Cooke, McCullough & Co., surely their trustee cannot.

There is then nothing in any principle of equity, or rule in bankruptcy that affects the right of the United States to priority of payment of the debt due them out of the private estates of the bankrupts in the hands of the trustee, and a decree will be made accordingly.

Let a decree be prepared declaring that the United States are entitled to be paid, out of the property in the hands of the trustee, belonging to the private estates of those partners of the firm of Jay Cooke, McCullough & Co., who have been adjudicated bankrupts, the amount due by the said firm to the plaintiffs on the day the petition in bankruptcy was filed, in preference to other creditors, and declaring also that the United States are not required to exhaust their rights in the securities pledged to them before they are thus entitled.

And the right of the plaintiffs to apply for further relief in accordance with the prayer of their bill, without prejudice by reason of this decree, is reserved.

And all questions respecting the right of the defendant to subrogation hereafter, and respecting the administration of the securities in the hands of the United States, as also the right to an account, are likewise reserved for future adjudication.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A debtor of a bankrupt who merely accepts a transfer of the bankrupt's note without any stipulation concerning the terms of the transfer, holds it merely as trustee for the creditor, and cannot set it off against the debt due by him. A note which is held by a party as trustee for another, must be proved by the holder as trustee, or by the real owner.

Re GEORGE H. LANE, BRETT & COMPANY, Ex parte DREYFUS.

CHARLES AND JACOB DREYFUS, composing the mercantile firm of Dreyfus & Co., proved a debt of one thousand and forty-seven dollars and fourteen cents against the estate of the bankrupts, at the first meeting of the creditors. Afterwards the assignee of the estate applied to the Register in the mode pointed out by General Order No. 34, to have the claim re-examined and disallowed. The issues and evidence were certified to the court. The claim sought to be expunged was for the contents of the promissory note of the bankrupts for one thousand five hundred and nineteen dollars and fifty-eight cents, and interest, less the amount of an account of about five hundred dollars for goods bought of them by Dreyfus & Co. The assignees alleged that the note really belonged to Weil & Co., its original holders, and had been only transferred to Dreyfus & Co. after the failure of the bankrupts, though before their petition was filed, in order to enable Dreyfus & Co. to get the full benefit of the set-off, subject to an ultimate settlement between the parties after the amount of the dividends in the bankruptcy should be ascertained. The evidence consisted of the examinations of Charles Dreyfus and Martin J. Weil, who were the parties to the sale and purchase of the note. They agreed that Dreyfus bought the note after it was due, and after the failure of the promissors, and before it was known, or there were any means for estimating the amount they would pay; that the price of the note was one thousand dollars. They differed entirely as to the mode and time of payment of the

price, and Dreyfus changed his evidence several times upon these points.

M. Storey, for Dreyfus & Co. 1. Whatever view the court may take of the evidence, it cannot be denied that the legal title to the note was in my clients, and if so, they could sue on it and consequently can set it off against the assignees. (*Way* v. *Richardson*, 69 Mass., 412.) 2. It is unimportant that the promissors had failed when the note was transferred. The statute has nothing to do with the motives of persons who procure set-offs. It admits all debts in set-off which were not bought *after bankruptcy*. (*Re* City Bank, 6 N. B. R. 71.)

R. M. Morse, Jr., for the assignees, cited *Smith* v. *Hill*, 74 Mass., 572.

LOWELL, J.—The vexed question upon which able and learned judges have differed, whether a note or other debt bought after the insolvency of the debtor is known, though before bankruptcy, can be set off by the purchaser against a debt due by him to the bankrupt, does not demand our attention in this case, and I shall not review the decisions, because I consider that the prevarications of the holder of the note, in his sworn examination, and the other evidence which has been produced, warrant and require me to draw all reasonable inferences against his title. And this is hardly denied. I feel justified, therefore, in finding that the mere legal title to this note was transferred to Dreyfus & Co., not by an ordinary contract of sale, but to enable them to use it by way of set-off against their own debt to the bankrupt estate, to the extent of this debt. This transaction, of course, gives either Dreyfus & Co. or Weil & Co., or both, the advantage of a payment in full of about five hundred out of the fifteen hundred dollars. Supposing the bankrupts to pay nothing, the advantage would be five hundred dollars, and so in the inverse ratio of the dividend. If Weil & Co. and Dreyfus & Co. made some arrangement for dividing this gain, or any other bargain they chose to make, its validity would depend on the decision of the point of law above referred to, provided the

sale were actually made upon distinct and binding terms, fully agreed on. But in the very unsatisfactory state of the evidence as to the sale, I can discover only that there was a transfer of the note to Dreyfus & Co., and nothing as to its terms. It must be inferred that they hold it as the trustees of Weil & Co.

And I do not deny that the holder of a promissory note, being the mere trustee of the true owner, may maintain an action on the note. This is all that the case cited at the bar decides. But when a question of set-off is made, the case is different. If the defendant in such an action has a right of set-off against the true owner of the note, I apprehend that he could avail of that fact, in some mode, either at law or in equity, according to the division of powers in the courts of the jurisdiction, so that the judgment against him should not exceed what he owed to the real plaintiff. This is expressly enacted in Massachusetts by Gen. Stats., Chap. 130, Section 11. So in the converse case, of a debt sued against A, he could not set off a note of the plaintiff which he held as the mere trustee of a third person. Set-off, which is equitable in its origin, has always recognized the equitable rule that the debts must be due in the same right. This rule has often been acted on in bankruptcy.

If then, the assignees of Brett, Lane & Co. were to sue Dreyfus & Co. for the bill of goods sold, and the court and jury should find the facts to be as I find them, the law would be that the note could not be set off. The objection, therefore, to the proof of this debt is, that it was not large enough, or that it was not made by Dreyfus & Co. as trustees, rather than that it was made at all. But as I suppose the assignees fear that the state of the record might embarrass them in collecting the five hundred dollars, the order will be:

Proof expunged without prejudice to new proof being made by Weil & Co., or by Dreyfus & Co., as trustees for Weil & Co., for the full amount of the note and interest.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

A broker who holds stocks on a margin is bound to take notice of the buyer's bankruptcy.

If a broker, who holds stocks on a margin, continues to hold them for an unreasonable length of time after the buyer's bankruptcy, and then sells them without notice, he must sustain the loss.

In re JOHN H. DANIELS.

BLODGETT, J.—This is an application on the part of the assignee of said bankrupt to expunge a claim filed for between fourteen and fifteen thousand dollars, by the firm of F. B. Wallace & Company, of New York City.

It appears from the evidence in the case, that Daniels was, for some years prior to his being declared bankrupt, a banker at Wilmington, in Will county, in this district; that F. B. Wallace & Company, the claimants, were engaged in the business of stock brokers in the city of New York; that Daniels filed his voluntary petition in bankruptcy on the 3d day of July, 1873, upon which he was immediately adjudged bankrupt; that for two or three years prior to his bankruptcy, Daniels had been operating to a greater or less extent in stocks upon the New York market, through the firm of F. B. Wallace & Company, who purchased stocks upon the orders of Daniels, paying the money therefor and receiving and holding the stocks together with a margin of ten per cent., or less, as security for the money advanced by them.

At the time Daniels was declared bankrupt, Wallace & Company held seven hundred and fifty shares of the stock of the Chicago & Alton Railroad Company, which had been purchased pursuant to the arrangement I have mentioned, upon which, however, the margin was nearly exhausted, but the stock at that time could have been sold so as to have left some balance to the credit of Daniels in the hands of the brokers. After Daniels' adjudication, and until about the 18th of September, 1873, said stock remained at about the same price. After the 18th of September—being about the

date that Jay Cooke & Company failed—said stock declined rapidly in value, and on the 24th of October, Wallace & Company sold the same, and passed the proceeds to the credit of Daniels, leaving Daniels, by their account rendered, in debt to said brokers in the sum of thirteen thousand four hundred dollars. This amount, together with the interest accrued thereon, said Wallace & Company have brought as a claim against the estate of Daniels, and the assignee seeks to have the same expunged on the ground that it is not a valid claim to be paid out of the assets of said estate.

It will be noticed from the recital of facts, that at the time Daniels became bankrupt, the adventure in these stocks could have been closed so as to have left something to the credit of the bankrupt; in other words, the bankrupt did not owe his brokers anything at that time. True, it is claimed on the part of the brokers that this transaction was in all respects that of a loan from Wallace to Daniels of the amount of money necessary to buy the stocks in question, and that they simply held the stocks as security for their loan, but it is equally apparent from the evidence and from the nature of the transaction as developed by the proof, that Daniels was engaged merely in speculating upon the fluctuations in the value of this stock. He never intended to become the owner of this stock upon the books of the corporation by whom it was issued, but simply bought the stocks upon a margin which he had put up with his brokers for the purpose of making a profit if any should accrue in an advance on the price of said stocks. The real owners of said stocks were the brokers who had advanced the money to buy the same and held the stocks in their own name for their own security, together with whatever margin Daniels might have from time to time remaining in their hands.

It does not appear that any application was made by Wallace & Company to this court for leave to sell these stocks, nor did the assignee of the bankrupt, who was elected on the 18th of August, receive any notice from Wallace & Company of any such intention, but the brokers held such

stock probably as long as under the circumstances they thought it profitable or safe to themselves to hold them, and then, without notice, sold them upon the market for whatever price they would bring.

The bankrupt in his schedule refers to these stocks as held on a margin, and in which he had no interest except for a disputed difference between himself and his brokers in regard to the interest which had been charged him. As I said before, there was no indebtedness between the broker and the bankrupt at the time Daniels became bankrupt.

It was undoubtedly the duty of Wallace & Company under the circumstances, to take notice of Daniels' adjudication in bankruptcy. They were bound to know that their correspondent had lost the ability to control this venture from the time of his adjudication, and that the management of the affair was thereafter in the hands of this court; and as it is no part of the duty of an assignee in bankruptcy to speculate in stocks, there can be no doubt but what this court would have at once, on information being imparted to it of the condition of the bankrupt's estate with reference to these dealings with Wallace & Company, ordered said stocks sold and the adventure terminated; but without disclosing the relations which they bore to the court, Wallace & Company continue to hold these stocks upon a declining market, through a critical financial period, and finally sell them out without leave of court, and seek now to make the bankrupt's estate responsible for this large difference.

I do not think the claim, as it is presented under the evidence, should be allowed. It has all accrued since Daniels was adjudged bankrupt, and under such circumstances that I cannot conceive that the creditors or assignee of Daniels are morally or legally bound to sustain this loss.

The claim is therefore expunged.

UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

A copy of the record containing the assignment is admissible in evidence to prove the assignment, although it does not purport to be a copy of the whole record.

The proceedings in bankruptcy are not deemed to constitute an integral record, but a copy of each proceeding may be authenticated as a separate record, and is competent presumptive evidence of the facts therein stated.

In an action by an assignee to collect an assessment on the unpaid subscription of a stockholder, evidence of misrepresentations made at the time of the subscription to the stockholder by an agent of the corporation is not admissible.

An assessment upon the unpaid subscriptions of the stockholders made by the District Court having jurisdiction over a bankrupt corporation, is conclusive, and cannot be impeached in a collateral action.

MICHENER v. *PAYSON, Assignee of the REPUBLIC INSURANCE CO.*

ERROR to District Court.

Geo. Junkin, Esq., for plaintiff.

J. Cooke Longstreth, Esq., for defendant.

MCKENNAN, J.—The first assignment of error relates to the admission in evidence of a record of proceedings in bankruptcy in the District Court for the Northern District of Illinois, against the Republic Insurance Company of Chicago, as assignee of which the defendant in error brought this suit. It was objected to on the ground that it does not purport to be a copy of the whole record, but it was admitted to show, 1st, an assignment to the plaintiff below, and 2d, an assessment by the authority of the Bankrupt Court upon the stock of the bankrupt company to pay losses.

There can be no doubt of the admissibility of this record to show the assignment, because the 14th Section of the Bankrupt Act expressly provides, that a copy thereof, duly certified by the clerk of the court, under the seal thereof, shall be conclusive evidence of the assignee's title to sue for the bankrupt's property.

But was it properly admitted for the additional purpose for which it was offered?

The Bankrupt Act, while it enacts that the proceedings in all cases in bankruptcy shall be deemed matter of record, does not treat these proceedings as constituting an integral record, for it declares that they shall not be recorded at large, but shall be filed, kept, and numbered, in the office of the clerk of the court, and copies of such record, duly certified by that office, under the seal of the court, are made presumptive evidence of all the facts therein stated. It would, therefore, seem to be the intent of the act, that in so far as any of these proceedings might be used as evidence, copies of them are to be authenticated as separate records, and so are competent presumptive evidence of the facts stated in them. The certificate of the clerk of the court authenticates the copies of the papers and proceedings contained in the record "as true copies of all the papers filed, proceedings had, and record and docket entries made in said case, and of the whole thereof, in any way relating to an assessment upon the stockholders of said company," etc. It is an exemplification of all "matters of record" touching the assessment, and, as such, was properly admitted to show that fact.

The second assignment is founded upon the rejection of the offer to prove, by the plaintiff in error, certain representations made by the agent of the insurance company to him, when he made his subscription of stock, touching the establishment of a branch in Philadelphia, of which the subscriptions made there were to be the capital, which was to be under the control of a local board of directors, and was to be set apart for losses in Philadelphia risks, accompanied by further proof that this local office had been withdrawn, and the assurances given had not been fulfilled.

While it did not appear that any loss or injury whatever could result to the plaintiff in error from the partial non-fulfillment of these representations, it is at least questionable whether such evidence could have the effect of relieving the plaintiff in error from the payment of any part of his subscription. But in this suit it is altogether unavailable to him. Like a creditor's bill in equity, this suit is a proceed-

ing by the constituted representative of a bankrupt corporation to collect its assets, that they may be applied to the payment of its debts. The plaintiff in error is a subscriber to its stock, of which subscription he has paid only twenty per cent. The remaining eighty per cent. is part of the assets of the corporation, indispensably required for the payment of its debts, and its creditors may lawfully insist that it shall be so appropriated. Now, it is plain that the plaintiff in error cannot gainsay this right of the creditors, unless he can show such an equity as would entitle him to a preference over them, if he had paid up his stock subscription in full. But he took and held a certificate for the full amount of the stock subscribed for by him, and received dividends upon it, and upon the basis of his subscription and that of others, the company was enabled to create its indebtedness. Surely, as against those who became creditors of the corporation upon the faith and security of its stock subscriptions, his equity is subordinate and unavailing, and was rightly so treated by the court below.

The only remaining question which requires notice, relates to the legal sufficiency of the assessment upon the stockholders, which this suit was brought to recover.

By virtue of the adjudication of bankruptcy and the appointment of an assignee, not only was the control of the bankrupt corporation over its assets, of every kind, superseded, but complete domain over them was conferred upon the assignee. He alone can sue for and recover them, and whatever rights the bankrupt had in reference to their collection, he can claim and enforce. He is also the representative of the creditors, for they can make the assets of their debtor available only through his agency. As Mr. Justice Dillon has well said: "However it might have been before, creditors cannot, since the supervention of bankruptcy, bring bills in equity or other actions in their own names directly against the stockholders, to enforce their liability with respect to their unpaid stock."

It was one of the unquestionable faculties of the bank-

rupt corporation to assess ratably upon its unpaid stock a sum sufficient to pay its debts, and the exercise of this power the creditors might have compelled. But by the proceedings in bankruptcy, the power of the directors and the direct remedies of the creditors, in reference to the assets of the corporation, were superseded, and the assignee was constituted the representative of both these interests. In the exercise of all his functions in this twofold character, he is subject to the control and direction of the court in which the bankruptcy proceedings were instituted. It has exclusive jurisdiction of the administration of the bankrupt's assets, and of their distribution among creditors. Any adjudication which it may make in the exercise of this jurisdiction is unquestionable in a collateral proceeding in another forum. The assessment in question was directed and sanctioned by the court, which has authority so to adjudge, and for any excess in it redress must be sought in that tribunal.

The record then shows a valid assessment upon the stockholders of the bankrupt, and the instruction given to the jury, in reference to it and to the right of the plaintiff below to recover, was correct.

The judgment is therefore affirmed.

UNITED STATES CIRCUIT COURT—E. D. WISCONSIN.

Where the record shows that the original demand or cause of action sprung from fraud, the judgment does not merge the fraud, and is not released by a discharge.

Where the record shows a material and traversable allegation of fraud as its sole foundation, the judgment need not on its face show that the demand originated in fraud.

WILLIAM S. WARNER v. *AARON H. CRONKHITE.*

THIS action comes into this court by removal from the Circuit Court of Ontagamie county.

The complaint sets forth the following state of facts:

That on the 11th June, 1859, the plaintiff brought an action against the defendant in the Circuit Court of Ontagamie county to recover damages claimed to have been sustained by the plaintiff, by reason of alleged frauds practiced by defendant upon plaintiff in the sale of certain lands; that the action and the right of the plaintiff to recover therein were founded solely upon the said frauds; that issue was joined in that action by the parties thereto, trial by jury had, and verdict and judgment were rendered in favor of plaintiff against defendant, for twelve hundred and fifty-eight dollars and eighty-seven cents damages and costs; that this judgment has never been appealed from, reversed, or set aside, and has not been paid.

The complaint then alleges, that after the rendition of this judgment, the defendant procured from the United States District Court for the Eastern District of Missouri, his discharge in bankruptcy, and that the defendant claims that by this discharge his liability to the plaintiff, upon the debt represented by the judgment, is discharged. The complaint next alleges, that the debt represented by the judgment was created solely by the fraud of the judgment debtor, and that the debt is not canceled by the discharge in bankruptcy; and closes with the allegation that this action was commenced upon such judgment by leave of the Circuit Court of Ontagamie county, and judgment is demanded for the amount alleged to be due upon said former judgment, with interest.

The defendant answers this complaint and says, that after the rendition of the judgment mentioned in the complaint, the parties to that judgment entered into a written stipulation, by which the plaintiff waived his right to an execution against the body of defendant upon the judgment, and expressly agreed that no execution should ever be issued against the body of the defendant in that action; and by which stipulation the defendant, on his part, waived all errors in entering said judgment and in all orders prior to the entry thereof, and further agreed that he would not take any appeal

from the judgment or any of said orders. It was further stipulated between the parties, that said judgment should be and remain in all respects binding upon the real and personal property of the defendant, and that no other or further right of the plaintiff than that of execution against defendant's body, was relinquished by the stipulation.

To this answer the plaintiff interposed a demurrer, and the question is, does the stipulation set forth in the answer constitute a defense to this action?

Annexed to the complaint is a certified copy of the judgment record in the original action, from which it appears that that action was founded upon certain alleged false and fraudulent representations made by defendant to plaintiff in an exchange of property between the parties. The gravamen of the complaint in that action, and the gist of the action, was fraud. The judgment rendered was in terms and form a simple money judgment, no reference to the ground of action being mentioned therein.

D. G. Hooker, Esq., for plaintiff.

W. P. Leind, Esq., for defendant.

DYER, J.—Section 33 of the Bankrupt Act provides, "*that no debt created by the fraud* or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt." It is claimed by the plaintiff that the ground of the action in which the judgment now sued on was rendered being fraud, the debt was not discharged by the bankruptcy proceedings, and that the stipulation in question did not extract from the judgment which at the time of the bankrupt's discharge represented the debt, the element of fraud upon which it was originally founded. It is claimed by defendant's counsel that the original debt or claim was merged in the judgment, that to show the alleged fraud, within the meaning of Section 33 of the Bankrupt Act, so as to make the debt in this case one from which the

defendant was not discharged by the bankruptcy proceedings, it must be disclosed by the judgment itself that it was necessarily based upon the fraud; and that in any event, the stipulation made by the parties gave to the judgment the character of a mere contract debt, which was discharged by the debtor's discharge in bankruptcy.

When the original action between these parties was commenced, and when the judgment here sued upon was rendered, there was no statute in force in this State authorizing an arrest of a defendant or an execution against his body in a case where fraud in contracting a debt or incurring an obligation was the sole ground of action. It was not until 1868 that a statute was enacted, authorizing an arrest in such a case. So that, although the parties seem by their stipulation to have supposed that the right to an execution against the body in that action then existed, in fact it did not exist. This being so, that stipulation becomes insufficient as a defense to this action, if the action itself can be maintained. For it is apparent, that the plaintiff's demurrer to the defendant's answer reaches back to the question whether the original demand, debt, or judgment was discharged by the defendant's discharge in bankruptcy, and consequently, whether this action will lie. There is some conflict of authority upon the question, as to whether the recovery of a judgment upon a debt fraudulently contracted merges the original cause of action, so as to relieve from liability to arrest, even where there is a statute authorizing arrests in civil actions founded upon fraud. In the case of *McButt* v. *Hirsch*, 4 Abb. Pr., 441, it was held, that in an action upon a judgment recovered upon a debt fraudulently contracted, the defendant was not liable to arrest on the ground of fraud in the original debt, and that the original cause of action was merged in the judgment recovered upon it. It will be observed here, that the point was not, whether an execution could be issued upon the judgment, against the body of the defendant, but the question was, whether in a new action upon the judgment, the defendant could be arrested because of the fraud

in the original debt; and in this state of the case the principle above stated was applied.

In the case of *Mallory* v. *Leach*, reported in note, 14 Abb. Pr., 449, there was a similar decision of the question. A judgment was recovered in an action for fraud. Another action was brought upon that judgment, and it was held that this second action was upon contract, and not for fraud, and the defendant could not, therefore, be arrested.

I have referred particularly to these two cases, because they as strongly affirm the principle of merger as any I find. The case at bar must be distinguished from those cases. We do not have here an action upon the judgment with an accompanying proceeding to procure an arrest, on the ground that the original cause of action upon which the judgment sued on was recovered sprung from the defendant's fraud. The question here is, whether the original cause of action was so merged in the judgment, and the original fraud so extinguished by the judgment, that it must now be held a debt which was discharged by the defendant's discharge in bankruptcy.

Judge Blatchford, in the case of *Patterson*, 1 N. B. R., 307, after stating that the point involved was, whether the debt in that case was one excepted by Section 33 of the Bankrupt Act, from the operation of a discharge, says: "It is claimed by the bankrupt that the debt being in the shape of a judgment, this court cannot, in applying the 33d Section, go behind the judgment to see whether the claim on which the judgment was recovered, was created by fraud; that the judgment, which is now the only debt, was created by the claim, and not by the fraud; and that though the judgment was created by the claim, and the claim by the fraud, yet the judgment was not created by the fraud. This view is unsound. Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, then it is not to be discharged. To hold that the recovery of a judgment, in an action where the gravamen of the complaint is fraud, con-

dones that very fraud by so merging the original claim that the judgment cannot be said to be a debt created by the fraud set out in the complaint as the ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d Section."

The same principle is recognized and applied by Judge Lowell *in re* Whitehouse, 4 N. B. R., 63, and I think that the conclusions arrived at in these cases are sound, when applied to a case in which it appears by the record that the original demand or cause of action sprung from fraud. Now, in the case at bar, what does the record show? The complaint in the action in which the judgment sued on was rendered, shows a cause of action springing exclusively from alleged fraudulent representations in an exchange of property. It was not an action upon contract with immaterial allegations of fraud, but it was an action grounded solely upon the fraud. The summons in the action was not upon a liquidated money demand, but in terms demanded relief as it should in an action to recover unliquidated damages. The issue joined between the parties was upon the question of fraud, as appears by the complaint and answer. There was a trial by jury and an assessment of damages, and a judgment upon the issue of fact involved was entered on the verdict. Was it necessary that the judgment on its face should show that the ground of the action, or that the origin of the plaintiff's demand was fraud, in order to make it a case of a debt or demand created by fraud not dischargeable under the Bankrupt Law? I cannot think so. "As the record of the action shows a material and traversable allegation of fraud as its sole foundation, the debt or demand may fairly be said to be one founded in fraud, and the action to be one founded upon a debt or claim from which the bankrupt's discharge would not release him." (*In re* Whitehouse, 4 N. B. R., 63.) The distinction must not be ignored between the question as it presents itself in the case at bar, and as it would be presented in a case where the allegations of fraud in the original action were incidental and immaterial, or in a

case of an attempted remedy against the person of the defendant in an action on the judgment. Upon the record, it would seem that had there been no fraud there could have been no claim, and had there been no fraud, and consequently no claim, there would have been no judgment. Accepting the record as evidence of the character of the original cause of action, the debt in this instance, though now represented by a judgment, was created by fraud, and so excepted by the Bankrupt Act from the operation of a discharge.

Shuman v. *Strauss*, 10 N. B. R., 300; 52 N. Y., 404, is cited by defendant's counsel. But that was an action for the recovery of money only, and the summons was in the form prescribed by Subdivision 1 of the section of the Code relating to the form of the summons, which subdivision has reference to actions upon liquidated demands. It was held in such a case that upon the non-appearance of the defendant, judgment being perfected upon an assessment of damages by the clerk, the defendant is not concluded by the allegations of fraud in the complaint; but that the plaintiff's right of action for, or remedy under the statute by reason of the fraud, is merged in the judgment. The court, after speaking approvingly, as I understand their decision, of the doctrine laid down in the case of Patterson, 1 N. B. R., 307, and some other similar cases, say that they come far short of the claim of the plaintiff in the case then decided, and a mere statement of the character of that case, as already given, makes the correctness of that observation of the court obvious.

Wood v. *Henry*, 40 N. Y., 124, is also cited. In that case the defendants, as commission merchants, received certain property for sale from the plaintiff. They sold the property, but did not account for the proceeds. These facts were alleged in the complaint, and so it appeared that the defendants acted in a fiduciary character. Judgment was taken by default. No order of arrest had been obtained during the pendency of the action, and the question was whether an execution upon the judgment could be issued against the persons of the defendants. A majority of the

court held that the allegations of the fiduciary character of the defendants were not traversable, and that no execution could issue against the person upon the judgment, because the cause of action did not necessarily import liability to arrest, the cause of action and cause of arrest not being identical. In other words, upon trial, *proof of the fiduciary relation was not indispensable to recovery.* There is a plain distinction between that case and this at bar; for here there could have been no recovery without proof of the alleged fraud, for the fraud was the entire basis of the action. It was, in short, the sole cause of action. *Prouty* v. *Smith*, 51 N. Y., 594, is in character and principle like *Wood* v. *Henry*, while *Roberts* v. *Prosser*, 53 N. Y., 260, enforces the principle applied in the case at bar as distinguished from the other cases cited. I do not think *Bangs* v. *Watson*, 75 Mass., 211, is applicable to the question we have here. The original cause of action in that case arose upon contract. Judgment was recovered, and it was held that there was a merger of the original indebtedness in the judgment, and that the judgment did not, within the provisions of the insolvent law of Massachusetts, constitute a claim for necessaries not dischargeable under the act, although the original demand was for necessaries. The language of that act was; "No discharge of a debtor shall bar any claim for necessaries furnished to such debtor." The language of the 33d Section of the Bankrupt Law is: "No debt *created* by fraud shall be discharged under this act." The Massachusetts statute specifies the claim in the form in which it exists at the time of insolvency proceedings. It must, then, to be excepted from the operation of a discharge, be in the *form* of a claim for necessaries, and it is not in such form when in judgment. The language of the Bankrupt Act requires an inquiry into the origin, the creation of the debt, and if created by fraud, it is not to be held discharged. In the case of *Palmer* v. *Preston*, 45 Vt., 154, cited by defendant's counsel, the action was upon contract. Fraudulent representations had been made to procure a certain indorsement, but the fraud

was not the foundation of the judgment recovered. The judgment was held to be discharged by the bankruptcy proceedings, and not to be within the exception of the 33d Section of the Bankrupt Act, because the debt in question was created by contract, and as the debt had been treated as a demand so created, it was held that the fraud was waived. The case is, therefore, inapplicable to that under consideration.

The demurrer to the defendant's answer must be sustained.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A resolution of composition which provides for payment in indorsed notes is defective, and will not be ratified.

In re LANGDON.

LOWELL, J.—The resolution for composition, which appears to have been duly passed and confirmed, is bad in substance. It is that the bankrupt pay fifty per cent. of his several debts in the "notes of the said Langdon, indorsed by M. L. Bidwell & P. C. Langdon, and payable in six, nine, and twelve months from the date of the passage hereof, without interest."

Judge Blatchford has decided that the statute requiring the payment to be in money does not mean that all the money must be paid in one sum; that the payment may be by installments, and may be secured by such notes as the resolution may clearly designate. I am informed that at least one other judge has taken a similar view of the meaning. I have ordered a resolution to be recorded which undertook to pay seventy per cent. in four equal installments, the payment to be guaranteed in a certain mode agreed upon. I do not think the statute can be worked to any great advantage if this is not its construction, and the language used certainly admits of it. It refers to money as contrasted with any other property. If the payment is not to be made

instantly, I see no ground for saying it may not be divided into installments, as well as deferred for a week or a moment beyond the time actually necessary to pay the money. In short, money does not mean cash on the nail, or on demand, but that whenever paid, it shall be in what the law admits to be money.

But this resolution is distinctly for a payment in notes, which is a very different thing; for the instant the notes were taken or tendered, the payment, according to the resolution, would be complete; and certainly these notes are not money. Notes, by the law of Massachusetts, are presumed to be accepted as payments, unless the contrary appears. But even this is not the law as Congress would probably understand it. And it is not so held because notes are money, but because they are supposed to be a better security than an ordinary book account or oral promise, and may be understood to have merged or become a substitute for the less convenient security. It is impossible to hold that this resolution provides for a payment in money.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months prior to the commencement of the proceedings in bankruptcy, in order to convict a party of a fraudulent disposition thereof.

The intent of a party is ordinarily to be inferred from evidence which tends distinctly and directly to prove the intent.

In order to obtain a conviction for concealing assets from the assignee, it is not necessary to prove a demand on the part of the assignee.

UNITED STATES v. *JACOB O. SMITH.*

DURING the months of September, October, and November, 1871, Jacob O. Smith, then doing business as a retail boot and shoe merchant at Rochester, New York, obtained upon credit about twenty-five thousand dollars worth of boots and shoes from various wholesale dealers in New York and the manufacturing towns of the East.

The first notice that the creditors received of Smith's fraudulent operations was about the middle of December, 1871, when an attorney from Rochester came to New York City and endeavored to effect a compromise upon a low basis, making the usual plea of hard times and misfortune. Upon examination it was found from the books of the express and railroad companies that, during the months of October and November, Smith received a large quantity of boots and shoes from New York City and the East, and that during the time he was receiving these goods he was shipping large quantities of boots and shoes to the auction houses of George P. Gore & Co., of Chicago; Murdock & Dickson, of St. Louis; to his brother, F. H. Smith, at Chicago, to be sold at auction; to his father, I. Smith, at St. Louis, to be sold at auction; to J. O. Smith, at Lockport, N. Y., and to various auction houses in Louisville, Ky., and Cincinnati, O. It was further ascertained that the goods shipped to J. O. Smith, Lockport, were put into a store there, sold at retail for a few days, and the remainder, amounting in value to about eight thousand dollars, was sold by Smith to one A. W. Henderson on the 1st of December, 1871. For this sale Smith claimed he received from Henderson about two thousand dollars in money, and about six thousand dollars in Henderson's individual notes.

It further appeared that on the 14th of December, 1871, one L. M. Farnham, of Chicago, filed a petition in bankruptcy against Smith. That Smith made the affidavit of bankruptcy admitting he was a bankrupt; and on the same day Smith's attorney consented to an immediate adjudication in bankruptcy.

The proceedings in bankruptcy were probably collusive. The petition was verified by the attorney instead of the creditor; and as such a petition had then been held defective, it was doubtless a part of the plan to defeat any civil or criminal proceeding by setting up the defect in the petition.

When the creditors determined to prosecute the case, they caused a new petition to be filed on behalf of James Griffin, of New York, and then had Smith indicted for dis-

posing of his goods with intent to defraud, and for concealing his assets. The defect in the petition was the main reliance of Smith's counsel upon the trial, but the court held that Smith's admissions in the affidavit of bankruptcy, and a recent decision of the Circuit Court, were conclusive against the defendant.

Hon. Richard Crowley and *Charles M. Dickinson, Esq.*, for United States.

George Gorham, Esq., and *Tourtelotte, Esq.*, for defendant.

HALL, J.—Whatever may be your final verdict in this case, I am sure you will agree with me in the feeling, that it is a case which deserves your most careful and serious consideration. The charge against the defendant is one of a serious character, and the punishment, if he is convicted, will be of sufficient magnitude to deter others, to some extent, from the commission of similar offenses. It is important to him, therefore, that he should not be pronounced guilty, and it is the duty of the jury not so to pronounce him guilty, unless the evidence in the case justifies that verdict; but, on the other hand, if he is guilty of the offense charged upon him, it is certainly the duty of the jury, as it is for the interest of the public, that they should not hesitate, if they are entirely convinced of his guilt, to pronounce him guilty. The Bankruptcy Act passed by Congress, has for its object not only the discharge of the unfortunate, but honest debtor, from his liabilities, but it has also for its object the security of the creditor against the fraud and dishonesty of his debtor; and in pursuance of the desire and object of Congress to provide securities against fraud on the part of debtors, a section was introduced into the Bankruptcy Act upon which the indictment in this case is found. The section contains several provisions, making several different acts criminal, and among them are two which form the basis of this indictment. There are three counts in the indictment; the first and the last count are founded upon a provision of the statute which declares that if any bankrupt shall, with intent to defraud his

creditor, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by *bona fide* transactions, in the ordinary course of his business, any of his goods or chattels, which have been obtained upon credit, and which remain unpaid for; he shall be guilty of a misdemeanor, and shall be punished as provided in this section.

You will see, gentlemen, the general object of this provision. Whenever a debtor, especially a trader, is clearly insolvent, it is the object of the Bankrupt Act to enable his creditors to take proceedings against him, and to secure a fair and equal division of his property among them, with such preference as the act itself provides for, with the exception of such property as the bankrupt is entitled to retain under the provisions of the act. The case proceeds upon the ground that each one of the creditors is entitled to share equally; and when it has been established that the act of bankruptcy has been committed, that the party is insolvent, and that he has done something which is in violation of the act, and in violation of the rights of the creditors, proceedings may be taken against him by his creditors, he may be forced into bankruptcy, and his property then be distributed under the provisions of this act. For the purpose of carrying out this object, securing this equality among creditors, securing the proper division of the property of the bankrupt, this section, as I have stated, provides that if he shall within three months next before the commencement of the proceedings in bankruptcy, dispose of his property except by *bona fide* transactions, that is, transactions in good faith, and in the ordinary way of his trade—that is, the ordinary, regular, and customary mode of proceedings in his trade or business, prior to the time when he became a bankrupt—now, if he shall do this, if he shall pawn, pledge, or dispose of, otherwise than in an honest manner, and in *bona fide* transactions, and in the ordinary ways of his trade, any goods or chattels which have been obtained on credit, and remain unpaid for, in this way, with intent to defraud his creditors,

he is guilty under the provisions of this act. It is not necessary, as has been stated to you by the District Attorney, that the goods which have been so disposed of shall have been obtained within the three months next prior to the time when the proceedings in bankruptcy shall have been filed against him. No matter when they were obtained, if they have been obtained upon credit, and have not been paid for, and have been so disposed of within the three months next prior to the petition in bankruptcy, with the intent to defraud, then the offense is completed, and the defendant must be found guilty of the offense charged against him.

Of course, gentlemen, in looking at this case, you will consider what is the ordinary way of trade with the defendant, and persons transacting business of a similar character, and you must determine from the evidence whether the transactions to which your attention has been called by the District Attorney, were *bona fide* transactions, honest transactions, transactions made in good faith, without any intent to defraud his creditors, or whether they were of a different character, and made with intent to defraud. You have heard, gentlemen, the evidence at length upon this question; you have heard very able and full arguments from the counsel of the accused, and from the public prosecutor, and I shall not attempt to give you any instructions in regard to the evidence which has been given here, and certainly not indicate to you any opinion in regard to your duty in respect to the question of fact which has been submitted to you. The intent of a party is ordinarily to be inferred from evidence which tends distinctly and directly to prove the intent, because it is impossible in ordinary cases to prove what the intent of a party is, except by what is called circumstantial evidence. Of course, jurors have no power to look into the mind of the party, to determine precisely what his intent may be; but that intent is to be inferred from all the circumstances of the case, subject, however, to this theory and presumption of law, that a man intends when he commits an act, the ordinary and usual consequences of that act, or the

inevitable consequences of that act. If a man commits an act, the natural consequences of which are to defraud his creditors, the law presumes that it is done with that intent, and that presumption must be acted upon, and must prevail, unless it is destroyed by the evidence produced upon the part of the party accused.

Now, in reference to the other count in the indictment; gentlemen, that count is founded upon a provision of this section, which also makes it a criminal offense for a bankrupt to conceal from his assignee, or omit from his schedule, any property or effects whatsoever. You are, probably, aware that it is the duty of the bankrupt, in every case, whether his condition is voluntary on his part, or whether he is declared a bankrupt upon the petition of his creditors, to make a schedule and inventory, in which this property is to be described. That inventory is to be verified by his oath, and this is the schedule which is referred to, undoubtedly, in this provision of the statute. In this particular case, although the order of adjudication, being in the form prescribed by statute, required the defendant to file such an inventory and schedule, the evidence in the case is, I believe, that no such inventory and schedule has been filed, and therefore the ground on which the defendant is to be convicted under the second count, if he is convicted at all, must be upon the ground that he fraudulently concealed from his assignee, or assignees, some property or effects which belonged to him, and which should have passed into the hands of his assignee. The evidence upon that question relates almost exclusively to money which he alleges he received from Henderson on the sale of the goods in the store in Lockport. It is insisted here, by the District Attorney, that upon his testimony given before the Register, he stated that he received two thousand dollars as a part of the consideration for the sale of goods in that store; and that this property, as is insisted here on the part of the public prosecutor, has been concealed from his assignees; has not been turned over to them, and has not been made available.

Something has been said here in reference to a demand being necessary in order to charge the defendant under the provision of this statute. Under the evidence in this case I am of the opinion that no demand is necessary as a matter of law, in reference to the questions arising under this count in the indictment. He was brought before the Register, as appears by his own deposition, and examined in reference to his property; and upon that examination it was, undoubtedly, his duty, if he had property in his hands of this description and to this amount, to disclose that fact. It is evident from the examination which was made, that this examination was had for the purpose of discovering whatever should pass into the hands of the assignees for the benefit of his creditors; and if upon that examination he willfully omitted to account for that money, if he, in point of fact, received money to the extent of two thousand dollars, and withheld it from his creditors and from his assignee, then he is liable to be convicted under the second count in the indictment. If he paid it over to his creditors, to honest creditors, and stated the fact upon his examination, then he would not be liable, under this count in the indictment, for concealing from his assignee this amount of money. If he, having this money, thus concealed the knowledge of it from the assignee, he is liable to conviction, notwithstanding that there was no demand upon the part of the assignee or receiver, or any person authorized to receive it. These are, perhaps, gentlemen, all the remarks which it is necessary to submit to you in this case. You must examine it with care. Your verdict should be the result of your calm and deliberate judgment. You should be influenced by no passion or feeling, and by no sympathy. In a case of this character the interests of the public as well as the interests of the defendant require that your verdict should be the result of your deliberation and judgment, and in accordance with your sworn duty.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The debt due to a preferred creditor is not to be computed in determining whether the requisite proportion in number and value have joined in an involuntary petition. A preferred creditor cannot prove his debt until he has voluntarily or by compulsion surrendered his preference.

A mere repayment to the debtor cannot take the place of a surrender to the assignee. Debts for a less sum than two hundred and fifty dollars are to be reckoned in the amount that is necessary to join in an involuntary petition.

The creditors may obtain one-fourth in number of the creditors whose debts exceed two hundred and fifty dollars, or one-fourth of all, provided one-third in amount of all the debts are represented in the petition.

It is not necessary that the larger creditors shall be requested to sign the petition, and refuse.

In re J. R. CURRIER.

C. P. Greenough, for the petitioners.

J. B. Richardson, for the defendants.

LOWELL, J.—In this petition for adjudication against the defendants, one act of bankruptcy alleged, and the only act relied on at the hearing, is a preference to T. Dana & Co., by a transfer to them, out of the ordinary course of business, of the whole proceeds of the debtor's stock in trade, tools, etc., which, to be sure, amounted, after providing for a valid mortgage, to less than three hundred dollars, and which still left Dana & Co. large creditors of the defendant, for the balance of their running account. The questions for decision are, whether the transaction amounted to a preference, which would be voidable by the assignee, and if so, whether the balance remaining due to Dana & Co. is to be reckoned in ascertaining whether the requisite amount of debt is represented by the petitioners.

First. It was hardly denied at the hearing that, upon the facts shown, the preference was one that could be avoided by the assignee, though, of course, that point will not be concluded by any decree made at this time.

Second. It has been twice decided that the debt due a preferred creditor under such circumstances ought not to be

reckoned in a proceeding of this sort. (*Clinton* v. *Mayo*, 12 N. B. R. 39; *Re* Israel, *Id.*, 204.)

The original statute, re-enacted in Rev. Stat., Section 5084, forbids proof by a preferred creditor, unless he shall surrender his preference; and the surrender must be voluntary, and before final judgment against him for the amount of the preference. I speak of that statute as it has been construed in this court, and by what I consider the weight of authority.

The new statute enacts that if the preference is set aside at the suit of the assignee, the creditor, in case of actual fraud, shall not be permitted to prove more than a moiety of his debt. (St. 1874, ch. 390, Section 12; 18 Stat., 181.) This undoubtedly provides by necessary intendment, that if there has been no actual fraud, he may prove his whole debt after a recovery has been had against him for the preference, and if there has been fraud one-half thereof. But it is nowhere said that if he has received a preference, he may prove his debt, or any part of it, until he has either voluntarily or by compulsion surrendered his advantage.

Now, I do not care to enter into any question whether a preferred creditor may at the first meeting surrender, or whether he must wait till the assignee is appointed. There has been no offer of surrender here, nor any one to whom a surrender could be made. It is plain that a mere repayment to the debtor, with intent, perhaps, to defeat the proceedings, cannot take the place of a surrender to the assignee.

It seems, then, that Dana & Co. are not creditors who could, under ordinary circumstances, vote at the first meeting, and I agree with the decisions cited, that they cannot be reckoned at this time. I will add one consideration peculiar to this case. It has been repeatedly decided in this court and elsewhere, that a preferred creditor has no standing in a Court of Bankruptcy to proceed for adjudication against his debtor, for the very act to which the creditor has been a party. He is estopped on every principle of equity. It was

once said by a late very learned and able judge, that where the preference consisted in merely suffering a judgment to be obtained, in advance of other creditors, and a seizure on execution under such judgment, the creditor thus preferred might and ought at once to proceed in bankruptcy against the debtor. But the doctrine that there is any such preference being now exploded, the *dictum* must go with it. There never has been a decision, and I apprehend will not soon be, that a conscious party to a fraud, though it be only a technical one, can take advantage of that fraud as foundation for a suit against the other party. I add, therefore, to the reasons already given why the debt of Dana & Co. should not be counted, that they ought not to join and have no right to join in this petition.

In this very case the ultimate purpose of the whole proceedings is to recover this preference, and though it turns out to be less in amount than was supposed, yet the principle is the same. It cannot be that the assent of the very creditor indirectly proceeded against is necessary.

A brief has been submitted to me upon another point which was ruled at the trial, and, as I supposed, settled at that time. The petitioners are one-fourth in number of the creditors whose debts exceed two hundred and fifty dollars, and indeed of all the creditors, and they represent one-third in amount of all the provable debts, excluding Dana & Co., but they do not represent one-third in amount of the debts exceeding two hundred and fifty dollars, if they alone are to be regarded. In other words, though they hold more than one-third of all the presently provable debts, exhibited by the debtor in his list, they do not hold one-third of those that are above two hundred and fifty dollars. And the defendant insists that where there are such creditors they alone are to be regarded, unless upon notice and request they have refused or neglected to join.

Judge Blatchford has decided that the word "number" in the statute is to be construed "number and amount." (*Re* Hymes, 10 N. B. R., 433.) Judge Brown has held that

number means number. (*Re* Hadley, 12 N. B. R., 366.) My impression is that the latter decision is on the whole to be preferred. It seems to me that Congress intended to say to petitioning creditors, If you obtain one-third of all the debts it shall be enough, if you have one-fourth in number of the larger creditors; but if there are no such creditors, or if they do not petition, you may make up the number from the smaller creditors. This was to provide, I apprehend, for those cases, not very rare, where there is a very great number of very small debts. and was meant to give the creditors the election of obtaining one-fourth in number of the chief creditors, or one-fourth of all, whichever they could, provided always one-third in amount of all the debts was represented in the petition.

I do not consider that this point is essential to the determination of the case, because I can see by inspection of the petition and of the debtors' list, that one-third in value of the creditors holding debts above the specified amount have failed to sign the petition, which brings the case within the exception of the statute. It is argued that there should be allegation and proof that such creditors have been asked to sign and have refused, but I think the statute means that a failure to sign may arise from any cause, such as illness or absence. Any other construction would be dangerous, and quite unnecessary, because a failure to sign is plainly shown by not signing. It was not intended that the larger creditors should be consulted at all events, but that the petitioning creditors should represent the requisite number and amounts of all the creditors, or, if more convenient in the particular case, at least of the larger creditors (however reckoned). But a case is always made out when the due proportion of all the creditors has joined; and the failure of the larger creditors to join is no defense. This petition is admitted to be good if those creditors had refused to join; and how they are any worse off by neglecting than by refusing, I am unable to see. If they are favorable to the petition, or if they are opposed to it, the same result follows.

The law was not intended to require a demand, when the acquiescence or the refusal could affect no rights in any way.

It is not without some significance that the rule of the Supreme Court, having the force of law, and governing the case of copartners, says: If one or more members *refuse* to join—not fail to join. The difference in meaning is obvious, though the cases are not otherwise parallel. A partner ought always to have notice, and an opportunity to assent to or to dispute his own bankruptcy, but a creditor whose action either way will bring about the same result has no such interest.

Adjudication ordered.

UNITED STATES DISTRICT COURT—INDIANA.

When a petition for composition is filed, the Register will be directed to give the proper notices to the creditors.

A resolution of composition must be confirmed as well as adopted by the requisite proportion. After the adoption of a resolution, a reasonable time may be given to secure such additional signatures as may be necessary to confirm it.

Creditors whose debts do not exceed fifty dollars are not to be reckoned in determining the number, but are to be reckoned in determining the value.

Secured creditors are to be allowed to vote as to the excess of the debt above the value of the security, in the same manner as unsecured creditors.

A creditor having personal security, and not security upon the estate of the debtor, is allowed to vote as an unsecured creditor.

Where a partnership desires a composition, the creditors may make the composition by a general vote and general confirmation, or if one of any class of creditors perceives that the other class is about to force upon him an unjust composition, he may demand a separate vote.

In re MICHAEL H. SPADES. In re JAMES W. MUIR and JAMES W. FOLEY.

GRESHAM, J.—By the amendment to the 43d Section of the Bankrupt Act, provision is made for the disposition of pending cases by means of a composition between the bankrupt and his creditors.

In certain cases when composition proceedings are pend-

ing, application is made to the court to settle questions of practice, and for the better regulation of this method of settlement, the following statement is made for the direction of Registers.

Upon an application to the court by a bankrupt whose case is pending, setting forth that he proposes to compound with his creditors, an order will be made and certified to the proper Register, directing him to call a meeting, and to give notice of not less than ten days to each known creditor, of the time, place, and purpose of such meeting. These notices will be sent by mail, properly addressed and postpaid, and a memorandum will be entered by the Register to the effect that he has received the order of the court and given the notices required.

The record of the Register should show that at the time appointed the bankrupt appeared in person, or if from some lawful cause prevented from so appearing, then by another person on his behalf, with a statement of the whole of his debts and assets, showing also the names and addresses of the several creditors.

The proposition of the debtor being submitted, must then be adopted by a majority in number and three-fourths in value of the creditors of the debtor *assembled at such meeting*, voting either in person or by proxy.

This alone does not authorize the submission of the composition to the court, for an additional step must then be taken; that is, the resolution must be confirmed by the signature of the debtor and of two-thirds in number and one-half in value of *all the creditors* of the debtor. If the vote of those assembled at the meeting does not amount to a majority in number and three-fourths in value, the matter is at an end. But should that vote be given in that number and value of those so assembled, a further step must be taken to confirm it by securing the signature of the debtor to the resolution, and also the signatures of a larger proportion of the creditors, to wit: two-thirds in number and one-half in value of all the creditors of the debtor. This provision of the law

is designed to protect the creditors from the effect of a resolution adopted by a small number assembled at such a meeting. The smaller number may adopt the resolution, but the larger number must confirm it, and it is plain from the language of the act, that after the adoption of the resolution, a reasonable time may be given to secure such additional signatures as may be required to confirm it.

A question arises upon the further provisions of the section as to how this voting and confirming is to be counted. The language of the amendment is: "And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to a sum not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number."

This language, which directs what shall be counted in *the majority*, is not free from obscurity. The majority, however, can only be ascertained by making the count, and as the method of making it is to be first determined before the vote is settled, it seems that the reasonable interpretation of this provision is that in settling the composition, whether for or against, creditors whose debts do not exceed fifty dollars shall not count in determining the number, but shall count in determining the value.

As to secured creditors, they are not counted at all, unless they satisfy the Register that there is an excess due them over the value of the security. That excess being determined by the Register, they are admitted to the vote as are the creditors whose demands are unsecured.

If, however, a secured creditor abandons his security, he is admitted to vote as one unsecured.

It is proper here to observe that the secured creditors to whom this exception applies, are those who are secured by the pledge, in some form, of property that, apart from their lien upon it, would go into the fund for general distribution. The language is general, to be sure, and, construed strictly and without reference to other provisions of the statute, might be made to embrace those creditors who have personal

security. But the law makes provision elsewhere for the protection of such sureties, allowing them to prove in full when they have paid the debt, and provides for their subrogation to the right of the creditor, if he shall have proved, and they afterward pay the debt. The provision for the abandonment of the security can only apply to such security as may be surrendered to the general fund, and can have no application to that form of security which could be abandoned only for the benefit of the surety, and not for the increase of the fund. It follows, of course, that a creditor having personal security votes upon composition proceedings as an unsecured creditor. The question of the effect of partnership relations in making a composition presents more difficulty. The law is silent as to partnerships. It proceeds apparently upon the theory that the debts and assets are all of a single class. It does not provide for a classification of debt and assets as being individual and partnership, and for a several vote and counting among the different classes of creditors. Are the creditors of A and those of B and those of the firm of A & B to be all counted together in determining the required numbers and values in these several stages for settling a composition? Or, are they to be separated into classes, and to vote and be counted in such classification before the question of composition can be determined?

The act provides carefully in Section 36 for the marshaling of the debts and assets, and the distribution of the several individual and partnership funds, according to the well-known equity rules. The creditors being so entitled, it is easily seen that very gross inequality might in some cases result by a vote for composition without requiring a classification. If the personal assets of partners are small and the personal debts large, the personal creditors could expect only a proportionate dividend, and therefore could readily vote for a composition that would be unjust to the partnership creditors, unless a similar ratio existed between their debts and the partnership fund. If their debts were in the aggregate comparatively small and the partnership fund large,

they could by the preponderating vote of the personal creditors, be driven to accept a composition which would be greatly below the amount of their dividends, were the cause to proceed to settlement by the assignee.

Congress could not have contemplated and intended any such inequality. The cases, however, to which the attention of the court has been called, are cases where the meetings have been held upon general notice to all creditors, both individual and partnership, and where the vote has been made by the creditors who assembled and those who signed the confirmation of the resolution, without any classification, and without any objection on that ground from any creditor. The state of the respective debts and funds may be such as to justify this course; and where they are so, it simplifies the proceedings very materially. Whether this condition of practical equality of the debts and assets, both individual and personal, exists, is shown to the creditors at the composition meeting, and it is their province to act upon it as they see proper. They may make the composition by general vote and general confirmation, if they are content with it. Or, if one of any class of the creditors perceives that the other class is about to force upon him an unjust composition, he can demand a separate vote, and so protect himself by calling to his assistance those who compose the class to which he belongs.

It would seem that by this application of the law no injustice can be done. There remains a second meeting to be called by the court, after notice to every known creditor, for the final allowance of the composition by the court, if it shall be found to be fair and to have been conducted according to law. Should it appear at this meeting that the common voting of all creditors, individual and partnership, together, worked injustice, the court can then consider if any and what redress should be given,

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

A mortgage made in good faith to secure future sales of goods to the mortgagor is valid to the extent of the advances actually made.

RICHARD MARVIN, Assignee of JOSEPH FARREL, v. *JAMES CHAMBERS.*

Richard Marvin, the plaintiff, in person.
Charles M. Dickinson, for the defendant.

BENEDICT, J.—This is an action brought by Richard Marvin, assignee in bankruptcy of Joseph Farrel, to set aside a mortgage made by Farrel to the defendant, James Chambers. It appears, from the evidence, that Farrel was a dealer in boots and shoes, accustomed to buy goods of the defendant. On the 5th of June, 1874, Farrel, not being at the time indebted to Chambers, applied to Chambers to buy more goods upon credit, whereupon it was agreed that goods should be furnished him from time to time, upon the security of a mortgage upon certain lands. In pursuance of this arrangement, the mortgage in question was made, which, in terms, stated that it was given to secure any liability, not exceeding the sum of three thousand dollars, that might be incurred by the mortgagor to the mortgagee. The clause in the mortgage is drawn to cover any present as well as any future liability; but, as before stated, it is admitted that no present liability existed at the time of its execution. Goods were thereafter sold by Chambers to Farrel, to the amount of some eight hundred dollars, and, no long time afterwards, Farrel became bankrupt. Now, Chambers claims to hold this mortgage as security for the value of the goods actually sold by him to Farrel upon the faith of the mortgage. The evidence contains some contradictory testimony as to whether Chambers knew that Farrel was insolvent at the time of the execution of the mortgage; but, there is no dispute as to the fact, that, after giving the mortgage, Farrel continued his business, and

actually received from Chambers some eight hundred dollars worth of goods, which were purchased upon the faith of the mortgage in question. The case is thus shown to be one of a mortgage executed in good faith, for a present good consideration. Such a mortgage is protected by the Bankrupt Law, and, to the extent of the advances actually made, is good as against an assignee in bankruptcy.

There must, therefore, be a decree dismissing the bill, with costs.

UNITED STATES CIRCUIT COURT—CONNECTICUT.

The assignee of a bankrupt corporation does not represent creditors so as to be able to prosecute their claims against a trustee who has rendered himself individually liable to them by making a false report.

A trustee of a bankrupt corporation who has made himself individually, liable to the creditors cannot be excluded from participating in the dividends until the other creditors are paid in full.

ALFRED BRISTOL, Assignee of the CHESHIRE BARYTES CO., v. *SAMUEL T. W. SANFORD.*

Dexter R. Wright, for the defendant and appellant.
John S. Beach, for the plaintiff and respondent.

WOODRUFF, J.—The complainant in this suit is the assignee of the Cheshire Barytes Company, in bankruptcy. That company was organized under the laws of the State of New York authorizing the formation of mining corporations. The defendant was one of the trustees of the corporation, and has proved, as creditor, a debt against the corporation, to an amount greater than the whole value of the property of the corporation which has come to the hands of the assignee. Other debts have been proved against the bankrupt, also exceeding in their aggregate the whole value of the said property. The bill herein is filed by the assignee, to exclude the defendant from any participation in the assets of the bankrupt, or, in form, to postpone him, in the distribution of the assets, to all the other creditors, denying to him any

dividend until the other creditors are satisfied. The ground upon which this relief is sought is, that the defendant, as an officer of the corporation, failed to comply with the provisions of the statute of New York under which the corporation was organized, in this, that certain annual reports required by that statute to be made and filed, showing the condition of the company and its capital, contained false representations in respect thereto; and that, by the provisions of such statute, the officers signing such reports, knowing them to be false, are made jointly and severally liable for all the debts of the company. It is claimed, thereupon, that the defendant is himself liable for all the debts of the bankrupt, and that it is unjust and inequitable to permit him to share in the property of the bankrupt, and thereby leave the debts due to the other creditors who reside in the State of Connecticut unpaid; and that they, having a just claim against him for payment of their respective debts, ought not to be put to a suit against him to enforce that payment, and, especially, to go to another State for that purpose, when there is a fund here, on the credit of which (in part, at least) the debts were contracted, which this court can administer as may be equitable, and which he now seeks, as creditor of the bankrupt, to withdraw.

The claim is a plausible one, and, upon the facts as they appear in the case, it is, in a popular sense, reasonable and just. But I cannot resist the conclusion that this complainant has misconceived his relation to the subject. If the statute of New York had declared that such neglect of compliance with its provisions, or such violation thereof, should render the incorporation invalid and void, and that those associated therein should be deemed copartners and liable as such, then, indeed, it would have been the duty of the Court of Bankruptcy to reject the claim of the defendant to be considered a creditor, and to have distributed the assets in payment of the debts due to other persons, leaving the defendant and his associates to settle their accounts among themselves. Indeed, in such case, it would have been pos-

sible to proceed against all of the associates as bankrupts, as in ordinary cases of copartners. If the relief now sought was aimed at, perhaps the mode last suggested would, in such case, have been necessary. But, here, the corporate existence and indebtedness is assumed, and, in this bankrupt proceeding, it cannot be denied that the defendant is a creditor of the bankrupt. Nothing in the statute of New York deprives him of that character. He could, but for the bankruptcy, have sued the corporation and recovered the amount of his claim as a creditor. The Bankrupt Law prevents his action, drives him to proof of his debt, and, in terms, allows him his dividends. The defendant, therefore, stands in the Bankrupt Court with a clear title to recognition as a creditor of the bankrupt, and a legal right to a dividend of its assets. What is it now sought, in equity, to oppose to such legal right? This and this only: Each other creditor is claimed to have, and, for the present, will be assumed to have, a clear legal demand against the defendant, to the amount of his claim against the bankrupt; or, in other words, the defendant is individually liable for that identical claim. If that be so, each creditor may pursue the defendant for the enforcement of that demand. But such fact vests no title, legal or equitable, in the assignee. He is in no such sense trustee of the creditors that he can prosecute such a claim. He does not represent those creditors therein, and no decree which this court can make, at his instance, in this suit, would bind those creditors. His action, in this respect, is gratuitous, and not devolved upon him by any provisions of the Bankrupt Law, nor by his duty to receive proof of debts and distribute the assets, under the direction of the Bankrupt Court, to those who make such proof. The defendant is not liable to the corporation. If any right, vested in the corporation, required that the defendant should not receive a dividend, then, indeed, the assignee would have a right, and would be bound, to withhold it, and resist any endeavor of the defendant, by proof of debt, or otherwise, to share in the assets. In short, the assignee does

not represent the creditors, in their title, legal or equitable, to proceed against the defendant; and the creditors themselves have acquired no lien upon the distributive share of the assets due to the defendant, which the assignee can recognize or enforce. The defendant was not bound to litigate the question of his liability with the assignee, unless it was shown that some other creditors had a lien, the amount of which it was necessary to ascertain. The facts here show no such lien.

I do not perceive that the circumstance that the debt due to the creditor is the same debt or measure of liability which the creditor may assert against the defendant under the New York statute, affects the position of this complainant. Clearly, it would be no defense to the defendant's claim to share in the distribution, if the assignee should show that, by outstanding promissory notes held severally by the persons who are creditors of the bankrupt, the defendant owed them more than the amount of his dividend, and that there was danger that they would be driven to another State to collect such notes. Whatever rights the creditors have, whether legal or equitable, the assignee must leave them to pursue, unless or until they acquire some lien on the fund itself. I concur fully with the views of the District Judge expressed on the summary application to the Bankrupt Court, and I deem them of like force in this suit.

I express no opinion upon the rights of the creditors, and by no means deny the power or duty of the court to recognize and give effect to the statute of New York. But I am of the opinion, intimated on the hearing and confirmed by subsequent reflection, that the assignee has no standing in this court, upon the facts here shown. The determination of this cause, however, should in no wise appear in such form as to be any apparent obstacle to the claim of the creditors, nor seem to be an adjudication of their rights.

The decree made "*pro forma*" in the District Court must be reversed, and the bill be dismissed, but, under the circumstances, without costs.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI.

A contract to take stock in a corporation, induced by fraudulent representations on the part of the directors and officers of the corporation, is not void, but only voidable at the option of the stockholder.

Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation to take stock in the corporation two years before its bankruptcy, for which he gave in payment his note secured by deed of trust on real estate, and during that period made no inquiry as to the true condition of the corporation, but suffered his note to be held out to the public as an asset of the corporation —the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the note.

JOHN FARRAR v. *WILLIAM R. WALKER, Assignee, etc., and JOSEPH T. REISTER.*

APPEAL from the United States District Court for the Eastern District of Missouri.

John Farrar, the complainant and appellant herein, brought his bill in the District Court to enjoin the defendants, who are respectively the assignee in bankruptcy of the North Missouri Insurance Company, and the trustee in the deed of trust hereinafter mentioned, from selling certain realty described in the bill, and to have a certain deed of trust executed by the complainant, on said realty, for the purpose of securing his note for one thousand dollars, canceled and set aside. Said note and deed of trust were executed and delivered on the 30th of December, 1871, by complainant to said insurance company, which was a joint-stock corporation, in payment of the price of the shares of the capital stock of that company, each of the par value of one hundred dollars, which complainant at that time purchased of said company. The company was, on the 8th of November, 1873, adjudged bankrupt upon a creditor's petition filed on the 2d of October, 1873. The claim for the relief sought by the complainant was based on two grounds, viz.:

First. On the ground of false and fraudulent representations concerning the financial condition of the company, alleged to have been made by the directors, officers. and agents of

the company, at and before the time when said note and deed of trust were given, whereby complainant was induced to take stock in said company, and to give the note and deed of trust aforesaid in exchange therefor, and subsequent false and fraudulent representations made by said directors, etc., whereby complainant continued to be deceived as to the true character and financial condition of the company; and

Second. On the ground that complainant received no certificate of stock, and that, consequently, the consideration for the note and deed of trust fell.

To complainant's bill, defendants interposed a demurrer, which the court below sustained, and a decree was entered dismissing the bill. From this decree complainant appealed to this court.

On the part of complainant the following points were made:

1. Fraudulent representations made by the authorized agents of a corporation, and by the company, in regard to material matters, constitute a good defense to an action for the subscription to stock made on the faith of such representations. (*Waldo* v. *Chicago R. R.*, 14 Wis., 575; *Crump* v. *U. S. Mining Co.*, 7 Gratt., 352; *Wert* v. *Crawfordsville Co.*, 19 Ind., 242; *Crossman* v. *Penrose Ferry Co.*, 26 Penn. St., 69; *Custor* v. *Titusville Gas Company*, 63 *Id.*, 381; *Cunningham v. Edfield & Ky. R. R. Co.*, 2 Head., 23; *Sandford* v. *Hardy*, 23 Wend., 260.)

2. The questions, of negligence or estoppel by some act of subscribers, have frequently been decided by the courts, and generally it is some extraneous circumstance showing acquiescence in the fraud, or a long lapse of time where the rights of others have intervened, which governs the cases where the contrary doctrine is laid down. Most of defendants' authorities are of these classes.

3. The question of completion of the contract in the bill is stated as follows: "That the company refused to deliver the stock to complainant, and never did complete the con-

tract on their part." The assignee seeks to hold complainant to a contract never executed by the company. If the company was still doing business, complainant might compel the issue of the stock, but the assignee cannot issue it. Complainant received no value or consideration for his money, and in equity ought not to be held to pay. (Angell & Ames on Corporations, Section 564.)

4. The company could only contract by its president and secretary. (1 Wagner's Statutes, 764, Sections 21 and 22.)

Therefore it could not be held on this contract at law. A bill in equity would have to be filed by complainant to get his stock. There is no mutuality of contract here, and complainant had a right to rescind.

5. There are cases where it has been held that absence of a stock certificate does not affect the stockholder's right to his stock, but the reason given is that the issue can be compelled. Not so in this case.

6. If complainant was guilty of *laches*, and for that reason ought to pay, it should be set up in an answer, so that a reply might be had. The bill on its face does not show *laches*. Therefore the demurrer should have been overruled.

7. The assignee takes the bankrupt's estate with its burdens, and can enforce no contract that the company could not enforce, unless there are circumstances which estop complainant from setting up the fraud, such as *laches*, lapse of time, acquiescence or participation in the organization or transactions of the company, after knowing the fraud. No such state of facts exists in this case, so far as the record shows. (3 Vesey, 288; 12 Vesey, 349.)

For the defendants it was urged:

1. The contract between complainant and the company to take stock, was not void by reason of the fraud alleged, but voidable only at the option of the party defrauded. (*Oakes* v. *Turquand*, Law Rep., 2 H. L., 325, 344, in cases there decided; *Reese River S. M. Co.* v. *Smith*, L. R., 4 H. L., 64; s. c., 2 Chan. App., 604; *Upton* v. *Englehart*, "The

Chronicle" (N. Y. Ins. Journal) of June 4, 1874; *Clarke* v. *Dickson*, E. B. & E., 148, and cases there cited.)

2. The bill not showing any disaffirmance prior to the company's bankruptcy, of the contract to take stock, and not showing that complainant used reasonable diligence in discovering the alleged fraud, or made any inquiry whatever as to the truth of the alleged representations, or that he was not otherwise guilty of *laches*, said contract cannot be avoided as against the company's creditors. (*Upton* v. *Englehart*, *supra*, and cases there cited; *Upton* v. *Hansbraugh*, 10 N. B. R., 369; *Clarke* v. *Dickson*, *supra*.)

3. The alleged misrepresentations, although they might constitute a good defense as against the company itself, constitute no defense as against the creditors of the company, represented by its assignee in bankruptcy. (*Oyilvie* v. *Knox Ins. Co.*, 22 How., 380; *Upton* v. *Hansbraugh*, *supra*; *Oakes* v. *Turquand*, *supra*; *Clarke* v. *Dickson*, *supra*.)

4. It is not essential, in order to constitute a person a stockholder in a joint-stock corporation, that a certificate should be issued to him. (*Agricultural Bank* v. *Burr*, 24 Me., 256; *Same* v. *Wilson*, *Ib.*, 273; *Ellis* v. *Essex Merrimac Bridge Co.*, 19 Mass., 243; *Chester Glass Co.* v. *Dewey*, 16 Mass., 94; *Hoagland* v. *Bell*, 36 Barb., 57; *Thorp* v. *Woodhull*, 1 Sandf. Ch., 411; *Commercial Bank* v. *Kortright*, 22 Wend., 348; Angell & Ames on Corporations, 9th Ed., 563, 564.)

In the course of the argument, the court expressed the opinion that the want of a certificate of stock was immaterial.

Henderson & Shields, for complainant.

Wm. R. Walker, for defendants.

MILLER, J.—This is a suit brought by the plaintiff, who was a stockholder in the North Missouri Insurance Company, to get rid of the payment of a note for one thousand dollars, which he had given in the purchase of stock. Mr. Farrar took stock in the company, and gave this note in payment

for that stock, secured by deed of trust on real estate. Two years after the giving of the note, the North Missouri Insurance Company failed, and was put in bankruptcy, and Mr. Walker was appointed assignee of the company, and being about to enforce that obligation for the benefit of the creditors, Mr. Farrar files his bill in the District Court in chancery, seeking to enjoin the sale of the mortgaged property, or rather the property conveyed by the deed of trust, which was about to be foreclosed. In that way he brings the proceeding into court to declare the note null and void, and he makes on his bill undoubtedly a case of fraudulent conduct on the part of the board of directors, or the officers of the insurance company—the whole of them—in publishing and representing to him very fraudulently and very falsely, that the insurance company was on its feet, in a prosperous condition; had a large amount of valuable assets beyond its liabilities, and that it was a good thing to take its stock; whereas he alleges that was false, and that the company was then insolvent, that these men knew it, and that he was defrauded in becoming a stockholder. We may say at the beginning, and the authorities on this point are clear, that if the corporation was still in existence, and was solvent and doing business, and suit was brought upon that instrument, Mr. Farrar could have pleaded these things in avoidance of that conveyance, and they could not have enforced it against him. But things are changed; the corporation has become bankrupt; it has no interest whatever in this conveyance, because, whether enforced or not, the corporation is dead, will not exist as an entity again, and will never receive a dollar of this money. It is now a question between the creditors of that corporation who are represented by Mr. Walker, the assignee, and a stockholder, who is indebted to the corporation for its stock, and while my first impressions were pretty strong against the idea that this liability could be enforced under such circumstances, and I was very much inclined to overrule the demurrer, and require the parties to answer and let all the facts be shown on a final hearing, due

consideration has changed my mind on the subject, and compels me to the conclusion that the bill must be dismissed, and that is this: That the paper, as it stands, admitting the fraud and everything, is not of that class of paper which is absolutely void, but is a paper, or contract, or obligation, which was voidable at the option of Mr. Farrar. He could, notwithstanding the fraud, hold on to the stock and take the chances of its becoming valuable; or he could say, if he chose, "I don't think it is worth the trouble to go into a fight to avoid this obligation." In other words, it was his option to avoid that contract or stand by its legal results, and if this failure had occurred within two, three, or even four months after he took the stock and became a stockholder in the company, I should be inclined to say that he had not had a reasonable time in which to examine into the affairs of the company, and see whether he had been defrauded; and that he had still remaining his option, even after the bankruptcy of the company and the appointment of an assignee, to move to set aside that conveyance, if he could show that it was fraudulent. But the business of these corporations is so managed in this country, that justice requires, at all events, that if one of its stockholders should make this paper and obligation, secured by real estate, which goes into the hands of the officers as so much assets of the corporation, and is paraded before the public as an asset, and he stands up for two years and lets that note and obligation of his, secured by real estate, be counted every year, or in every semi-annual statement that is made to the public, as so much cash, which the creditors of that company may look to to cover their losses—then it is too late, the lapse is too long to allow the fraud to be pleaded. Mr. Farrar was for two years a stockholder in that corporation; he had a right to access to all its books, and to vote for its directors; it was his duty to interest himself in its management so far as to see that what it said was true; that its directors were honest; that he should use his influence to get honest men in, and yet during these two years he stands up and does

nothing, makes no inquiry, no investigation. It is too late when the creditors pursue the corporation into bankruptcy, and the assignee pursues him for his note, to turn around and say, "I find out that I was swindled; I was there two years and I might have found it out and not let everybody trade on my note deposited there, but I was cheated, and I now rescind this contract." On that ground alone the bill comes too late, and the demurrer to the bill was properly sustained in the District Court.

The judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT—MINNESOTA.

A criminal intent is not to be presumed, but must be proved.
The doubt which will entitle a defendant to an acquittal must be reasonable.
A chattel mortgage is a disposition of property out of the usual course of business of the mortgagor.

UNITED STATES v. *JOHN BAYER.*

NELSON, J.—The defendant, John Bayer, a retail dealer in boots and shoes, committed an act of bankruptcy and was adjudged a bankrupt on the 22d day of June, 1875. He now stands before you charged:

First. With purchasing a stock of goods on credit, and while they were unpaid for, and within three months before proceedings in bankruptcy were commenced, giving a chattel mortgage thereon, out of the usual course of his business, with the intent to defraud his creditors.

Second. With permitting a fictitious claim to be proved against his estate, and knowing the same to be fictitious, one month before the proof thereof, and not informing his assignee in bankruptcy.

These acts constitute an offense under the penal section of the Bankrupt Law.

The purpose of this section is to preserve good faith in mercantile transactions, and to prevent a trader from abus-

ing the credit which may be allowed him in the course of his business.

It is in evidence and uncontradicted, that a chattel mortgage was executed by the defendant, and delivered to one John Kargleder, June 1, 1875, purporting to secure a note for five thousand dollars, which mortgage was antedated October 1, 1874; and it is further testified to by witnesses for the defense that Bayer owed Kargleder one thousand dollars prior to October 1, 1874, and on that day received from him four thousand dollars more, and that this mortgage was given June 1, 1875, in pursuance of an agreement between the parties that such security should be given.

The theory of the prosecution, which it has attempted to show by positive admissions of the defendant, and circumstances for your consideration, is that Kargleder never loaned Bayer any money October 1, 1874, and although he held his note for five thousand dollars, bearing date on that day, no money passed, and the note and mortgage were without any such consideration, and the whole transaction was a fraud.

If you should be satisfied beyond a reasonable doubt that such is the true account of this transaction, you should find the defendant guilty of both charges in the indictment. If, however, you find that Bayer did owe Kargleder, June 1, 1875, five thousand dollars, and executed this mortgage upon his stock, purchased on credit and unpaid for, you must consider whether he made such a disposition of this property with intent to defraud his creditors.

The chattel mortgage was a disposition of his property out of the ordinary course of business, but if it was executed in good faith, and in pursuance of a prior promise, and the money which was secured thereby was paid out by the defendant to his creditors, no criminal intent to defraud can legitimately arise from such mortgage.

Now, we judge of intentions by acts and circumstances. Criminal intent of a person is not usually divulged, except as it can be discovered from his conduct. If you believe the intention of the defendant was to defraud creditors, such be-

lief must arise from a consideration of all the circumstances —his admissions and his acts. If he has made any false and contradictory statements of the condition of his affairs, and of his indebtedness, they are important in determining his intentions; and so are his admissions in regard to the character of his debt to Kargleder.

Now, you are not to presume a criminal intent. This must be proved, as any other fact in the case, by proper evidence.

The defendant is presumed innocent of these charges until he is proved guilty beyond a reasonable doubt. You are, therefore, to put a favorable construction upon his conduct and his statements, if they admit of two constructions.

But while the defendant is entitled to the benefit of any doubt in your minds, it must be a reasonable one, the evidence must be insufficient to establish in your minds his guilt; his conduct and his statements must be inconsistent with any other conclusion.

There has been an effort made to attack the credibility of some of the witnesses in this case. If successful in reference to any material fact, you may reject the whole of the evidence given by any witness who is thus discredited. If a witness has given contradictory statements, under oath, of material facts, you would be justified in rejecting all of his testimony, as unworthy of credit. You are the judges of the weight of testimony, and must satisfy your own minds upon a conscientious examination of all the testimony in this case.

If the defendant is guilty, you should say so. The interest of every business man in this community, as well as your own, demand his punishment, if guilty. On the other hand, if the evidence fails to convince you of his guilt, you should acquit him.

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

A certificate that the special partner has contributed a certain sum in cash, and a certain amount in goods, does not comply with the statutes of New York, relating to limited partnerships, and the parties may be put into bankruptcy as general partners.

In re WILLIAM G. MERRILL and others.

Charles B. Sedgwick, for the creditors.
Francis Kernan, for the debtors.

WOODRUFF, J.—The firm of Merrill, Wilder & Co. were charged by a creditor with having committed acts of bankruptcy, and, in the petition, it was averred that the firm was composed of William G. Merrill, David Wilder, Villars Merrill, Junior, and George J. Letchworth, all general partners therein. The application for a decree adjudging them bankrupts was resisted by Letchworth, only on the ground that he was not, and had never been, a general partner, but was only a special partner in the firm, and that the copartnership was a limited copartnership, formed under the provisions of the statutes of the State of New York, wherein he was in no wise liable for the debts of the firm otherwise or beyond the capital he had contributed to the common stock. The District Court held him to be a general partner, and adjudged all the partners bankrupt, and that adjudication Letchworth seeks to review and reverse in this court. His petition of review states the facts upon which the adjudication proceeded, and, as the allegations of the petition are not denied, they are to be deemed admitted for the purposes of the review.

The only facts which I deem it material to notice, and upon which the petition will be disposed of, are, that the parties attempted to form a limited partnership in which Letchworth should share in the profits of the business to be carried on, and have the immunities which the statutes authorizing such copartnerships allow, and yet not contribute, nor be bound to contribute, his share of the capital in cash. They

entered into articles of copartnership containing numerous details touching the business to be carried on, stipulating that each of the four partners should share equally in the profits and losses of the business. The consideration for which Letchworth was to be thus admitted to membership in the firm, and permitted to share the profits, was, that he should contribute to the common stock one thousand dollars in cash, and, in addition thereto, "the entire inventory on hand, of the effects and property belonging to him, lately owned and used by M. Alden, deceased, and said Letchworth, supposed to be about eight thousand dollars." To carry their purpose into effect they signed and filed, as required by the statute, a "certificate of limited partnership," (so entitled,) in which, among other proper particulars, it was certified, that "the said William G. Merrill, David Wilder, and Villars Merrill, Jr., shall be the general partners, and the said George Letchworth shall be a special partner, and has contributed to the common stock one thousand dollars in cash, and about eight thousand dollars of effects and property, the exact amount of which is yet to be ascertained." To this certificate was annexed the affidavit of William G. Merrill, that Letchworth "has actually contributed the sum of one thousand dollars in cash, to the common stock of the said firm, and has paid in the same in good faith."

The statute under which the parties attempted to establish a limited partnership (1 R. S. of N. Y., 764, Section 2), provides, that such partnerships may consist of general partners, responsible as general partners now are by law, and "of one or more persons who shall contribute *in actual cash payments*, a specific sum, as capital, to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond *the fund so contributed* by him or them to the capital." It then requires that the certificate to be filed shall, among other things, state "the amount of capital which each special partner shall have contributed to the common stock," and that there shall be filed with the certificate an affidavit "stating that *the sums*

specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash."

It is quite certain, that the copartnership which these parties attempted to establish was not such as this statute provides for. They doubtless acted with most entire fairness and integrity. They no doubt supposed that what they did sufficiently satisfied the reason and intent of the statute, so long as, in their published notice, they informed the world that the capital contributed by Letchworth to the common stock was *not* actually paid in cash, but consisted in part of property, the amount of which was not yet ascertained. But this was not in compliance with the statute, and neither they nor the court are to entertain the inquiry, whether a statute authorizing just such a partnership as they entered into, and securing to Letchworth immunity for the debts of the firm, would not be a better statute than the Legislature have seen fit to enact. In general, all who share the profits of the business of a copartnership are liable to its creditors for all of its debts. The statute permits the formation of a copartnership in which, as to one or more of the members, there shall be an exemption from liability beyond the fund "contributed by him or them to the capital." The express condition of that immunity is, that that fund be contributed in actual cash payments. The expression "fund so contributed," which fund is made the limit of the liability of special partners, imports, contributed "in cash." It was, of course, competent for the Legislature to have authorized such partnership, and to have permitted the special partner to contribute property or goods at a just valuation, but they have not done so. So, it was competent to have permitted a contribution of part cash and part goods or other property, but, for reasons concerning which we are hardly at liberty to speculate, this was not done. We are bound by the statute, and the parties cannot claim under the statute, which derogates from the general rule of law, without showing a strict compliance with the statute. They cannot be permitted to

say that it was just as well for the firm and for its creditors to have a contribution of goods at their fair value as to have cash. The Legislature saw fit to require that he who contributed capital to be employed in the joint business, to be the basis or consideration of his participation in the profits, should, in order to the limitation of his liability for debts, pay all of that contribution in money, before the partnership should be deemed formed; that that money should be under the exclusive control of the general partners; that they should be at liberty to invest or employ it as in their discretion they saw fit, for the benefit of the firm and its creditors; and that no one should be permitted to share profits on the basis of a contribution of goods or property, and yet be entitled to limit his liability for debts. It is unnecessary to vindicate the statute, and yet it is pertinent to inquire—can a person be permitted, under such a statute, to put in one hundred dollars cash, and a stock of goods estimated at fifty thousand dollars, be permitted to share profits on the basis of a contribution of fifty thousand one hundred dollars, to capital, and yet be not liable for the debts?

I am decidedly of opinion that the parties failed to establish a limited partnership, and that they were always general partners. I may add, further, that an express provision of the statute, that the certificate filed shall state "the amount of capital which each special partner shall have contributed to the common stock," was not satisfied by a certificate that Letchworth had contributed "one thousand dollars in cash, and *about* eight thousand dollars of effects and property, the exact amount of which is yet to be ascertained."

For these reasons the decision of the District Court was correct. Whether the other ground of the decision was so or not it is unnecessary to inquire.

The adjudication is affirmed, with costs.

SUPREME COURT—NEW YORK.

No State court can require a bank in which the funds belonging to a bankrupt's estate are deposited, to pay a judgment against the assignee out of such funds.

HAVENS v. *NATIONAL CITY BANK OF BROOKLYN.*

APPEAL by the National City Bank of Brooklyn from an order of Mr. Justice Pratt, denying a motion of appellant to set aside and vacate an order by the same justice, made in proceedings supplementary to execution, requiring said bank to pay to the attorney of the judgment-creditor four thousand three hundred and eighty-four dollars and fifty-three cents, out of moneys deposited in said bank to the credit of the judgment-debtor in said proceedings.

The proceedings were upon a judgment recovered by Joseph H. Havens against Silas B. Dutcher, assignee in bankruptcy of the Central Bank of Brooklyn, upon an indebtedness of said Central Bank. The moneys on deposit belonged to the said Central Bank, and were on deposit to the credit of said respondent, as assignee in bankruptcy.

W. H. Hollis, for appellant.

E. L. Sanderson and *John H. Bergen*, for respondents.

Present—Barnard, P. J., Gilbert and Tappen, JJ.

BARNARD, P. J.—The appellant, The National City Bank of Brooklyn, is not a corporation having property of the judgment-debtor, under Section 294 of the Code. It is a depository of the Bankrupt Court of the United States for the Eastern District of New York. It has no power to pay out any of the funds so deposited, except upon a warrant of the assignee in bankruptcy, countersigned by the District Judge, or by a Register in bankruptcy of the district. The fund is in the Bankrupt Court, and is to be disposed of by order of that court. (Bankrupt Law of 1867, Section 27.)

The Bankrupt Court has the sole jurisdiction over the bankrupt's estate.

The order is reversed, with ten dollars costs.

Order reversed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

If a voluntary bankrupt desires to amend the petition in a matter that affects the jurisdiction of the court, and he has been guilty of delay in applying for the amendment, his application for leave to amend should show the facts and reasons why the amendment was not asked for sooner.

In re EDWARD T. WOOD.

THE petition in this case was filed February 29, 1868. It stated that the petitioner "had a place of business in New York." In February, 1873, the petitioner asked to file an amended petition, in which the following words "and has there carried on business of his own" were added to the above allegation.

BLATCHFORD, J. — The amendment asked cannot be granted in the form proposed. The words "business of his own" are not found in the act. The motion may be renewed on notice, on an affidavit showing the existence, at the date of filing the petition, of the facts specified in Section 11, as necessary to give jurisdiction, setting forth specifically the words proposed to be stricken out and those proposed to be inserted, and the reasons why the petition was not made originally in he proper form, and the reasons why the amendment was not applied for sooner, after the filing of the specifications.

SUPREME COURT—MICHIGAN.

The common law relating to assignments for the benefit of creditors is not a part of the State insolvent law, and is not suspended by the Bankrupt Law.

An assignment for the benefit of creditors is valid as against a judgment-creditor who lays an attachment in the hands of the trustee, for it is not absolutely vôid.

COOK et al. v. *ROGERS, Garnishee of BOW.*

On writ of error. On November 18, 1873, Albert Bow made a voluntary assignment of his property to Eli B. Rogers, for the equal benefit of all his creditors, no preferences being declared. Rogers accepted the trust and took possession. A few days later the plaintiffs commenced a suit against Bow in the Circuit Court, to recover a debt of some three hundred dollars they held against him.

On the institution of this suit they at once proceeded by garnishee process in the same court against Rogers. And being summoned to appear and make disclosure on such process, he appeared on the 16th of December, 1873, and made general denial. The plaintiffs then filed a series of special interrogatories to be answered by him, and on the 27th of the same month he appeared and answered categorically. From these answers it appeared that Bow had assigned to him as before stated, that the personal property assigned was estimated as worth several thousand dollars, and the real estate from twelve to fourteen hundred. It also appeared that Rogers had no interest other than that of trustee, and that he was in possession of the assigned property when the summons was served upon him.

On the 27th of July, 1874, judgment was given in the principal suit against Bow for damages, two hundred and eighty-one dollars and thirty-one cents, and thereupon on the same day the garnishee suit against Rogers, Bow's assignee, was brought on to be tried before the court, without a jury, and it was expressly admitted that when Bow assigned he was indebted for more than one thousand dollars, upon

claims already due, and that Rogers received into his possession from Bow, under the assignment, and still retained, property exceeding in value the amount of the plaintiffs' judgment against Bow. The counsel for plaintiffs then prayed a finding by the court, and they likewise presented two propositions of law in the nature of requests to charge:

First. That plaintiffs were entitled to judgment against Rogers because the assignment was not in compliance with Ch. 234, C. L., entitled, "Of the powers, duties, and obligations of assignees of insolvent debtors *under this title.*"

Second. That the plaintiffs were entitled to recover, because the assignment was void as contrary to and not in conformity with and made under the Bankrupt Law of the United States.

The court then made a finding of facts upon the disclosure and admissions, and decided as matter of law that the assignment was valid, and passed the title of the property to Rogers in trust for Bow's creditors, and that the possession by Rogers of the property in virtue of the assignment gave no right to plaintiffs as creditors of Bow to maintain garnishee process against Rogers; and that Rogers was entitled to judgment for his costs and expenses, which were fixed at twenty dollars.

The plaintiffs excepted to the finding, and caused the case to be brought here on writ of error.

L. N. Keating and *J. S. Galloway*, for plaintiffs in error.

First. If the assignment is void as to any creditor, garnishment will lie in his behalf. (*Keep* v. *Sanderson*, 2 Wis., 42; 12 Wis., 352.) So where the assignment is not in conformity with the State law. (*Geisse* v. *Beale*, 3 Wis., 367; *Page* v. *Smith*, 24 Wis., 368; *Norton* v. *Reed*, 6 Wis., 522; *Mann* v. *Huston*, 67 Mass., 250; *Barton* v. *Tower*, 5 Law Rep., 214; Chap. 234 Compiled Laws of 1871; *Stout* v. *Keys*, 2 Doug., 184; *Edwards* v. *Mitchell*, 67 Mass., 239.)

Second. The assignment not being under the provisions of the Bankrupt Law, and in conformity therewith, garnish-

ment will lie upon the part of the plaintiffs. (Cooley's Limitations, 273, 2d note; Bump on Bankruptcy, 259, 260; *Ogden* v. *Saunders*, 12 Wheat., 213; *Sturges* v. *Crowninshield*, 4 Wheat., 122, 196; *Hoyle* v. *Zacharie*, 6 Pet., 635; *Adams* v. *Storey*, 1 Paine, 79.) The Bankrupt Act *ipso facto* suspends State insolvent laws. (Matter of Reynold, 8 R. I., 485; *Commonwealth* v. *O'Hara*, 1 N. B. R., 86; *Martin* v. *Berry*, 2 N. B. R., 629; 37 Cal., 208; *Griswold* v. *Pratt*, 50 Mass., 16; *Day* v. *Bardwell*, 3 N. B. R., 455; 97 Mass., 247; *Chamberlain* v. *Perkins*, 51 N. H., 336.) A common-law assignment cannot have any greater effect than an assignment under the State insolvent laws; both are superseded by the passage of the National Bankrupt Act.

E. L. and *M. B. Koon*, for defendant.

First. A common-law assignment is valid irrespective of insolvent laws. (*Beck* v. *Parker*, 65 Penn. St., 262; *Reed* v. *Taylor*, 4 N. B. R., 710; 32 Iowa, 209; *Maltbie* v. *Hotchkiss*, 5 N. B. R., 485; 38 Conn., 80; *In re* Hawkins, 2 N. B. R., 378; 34 Conn., 548; *Perry* v. *Langley*, 1 N. B. R., 559; Bump on Bankruptcy, 259, 514.

Second. The authorities cited by counsel for plaintiffs in error, refer to assignments made under *State insolvent laws*—having the same object in view as the Bankrupt Law, to wit: The distribution of the debtor's assets and his discharge from his debts—and can have no bearing upon the present case. And the authorities are conflicting as to whether the Bankrupt Law operated to wholly suspend or supersede all State insolvent laws, or had that effect only when proceedings under the Bankrupt Law were taken. (32 Iowa, 209; 1 N. B. R., 204; 1 N. B. R., 36; 7 A. L. Reg., 100, 105; 9 A. L. Reg., 304; 37 Cal., 208; 3 McLean, 494.)

GRAVES, J.—Bow's assignment was a common-law conveyance for the benefit of his creditors at large. It contained no preferences whatever, but provided for an equal distribution among all his creditors. There is no pretense that Rogers was not a suitable person to be assignee, and no

hint is made against his responsibility. No fraud is found or imputed. The surrender of his property by Bow for the equal benefit of all his creditors, by the voluntary assignment, in no way exonerates him personally, or discharges his obligations, or can shield his future gains.

The first proposition of law submitted to the court is most properly abandoned. It was without a shadow of force. The second is, however, insisted on, and it is the only point attempted to be maintained, and an elaborate argument has been submitted in its favor.

Were it not for the apparent confidence of counsel that it possesses merit, we should dismiss it without a moment's hesitation and affirm the judgment.

Upon the case as it stands before us, it must be taken as true that the assignment was an honest conveyance to a proper person, and honestly and fairly intended to secure the full payment of all the creditors at the same time, and within a reasonable period, if the property should be found sufficient; and if not, then to be distributed equally and ratably within a reasonable time among all the creditors.

Nevertheless, the plaintiffs prosecute this garnishee process under the State law against the assets so assigned and dedicated to all alike, and under such process insist upon their right, in the name of the Bankrupt Law and as a consequence of its existence, to compel payment out of the assigned effects of their claim, in full and without delay, whatever may be the consequence to other creditors having equal equities, and without heed to the fact of sufficiency or insufficiency of the fund to satisfy the just demands of other creditors.

The proposition comes to this. Equal distribution of the property of the debtor *pro rata* is the main purpose which the Bankrupt Act seeks to accomplish, as we are told by the Supreme Court of the United States (*Buchanan* v. *Smith*, 7 N. B. R., 513; 16 Wall., 277); and yet a common-law assignment made to a proper person, and in perfect good faith,

and squaring exactly with the "main purpose" of the Bankrupt Act, is not only to be disregarded as void in a garnishee proceeding against the assignee in the State court, in the name and as a consequence of the existence of this act, but at the particular instance of parties, who, by the very proceeding itself in which and under which the claim is set up, are solely aiming to disappoint and defeat such "main purpose," and secure to themselves present full satisfaction without the slightest regard to the equal claims of other creditors.

Before yielding to a proposition so extravagant we should certainly require very convincing proof of its solidity and force.

The argument in its favor is in substance this. It is settled by authority from which there is no appeal, that the existence of a Federal Bankrupt Law *ipso facto* suspends all State insolvent laws; that the common law prevailing in this State, on which voluntary assignments for the benefit of creditors are based, and to which they owe all their legal efficacy, is a part of the State system regulating and governing in cases of insolvency, and within the principle which causes a Bankrupt Act to work suspension of incompatible regulations, and hence no voluntary assignment for the benefit of creditors, however right, regular, and proper in all respects in the abstract, can have any force or validity whatever if made whilst a Bankrupt Law is in existence.

Without stopping to consider whether a garnishee proceeding before a justice, or in the Circuit Court, is a proper one for raising the question, and without pausing to notice several difficulties in the plaintiffs' case, it suffices to observe that the second term involved in their proposition, and which they cannot dispense with, is fatally infirm.

There is no proper analogy between insolvent laws, correctly so called, and those principles of the common law here which allow and sanction the conveyance of his property by a debtor for the equal benefit of all his creditors, and no such resemblance or relation as to warrant the conclusion

that if the existence of a Bankrupt Law suspends the first, it must also suspend the last.

Insolvent laws are not principles which are the birthright of the citizen, and pervade the State as naturally as the right to acquire property and dispose of it; but they are artificial yet positive regulations made by the Legislature to exonerate the person or property of the debtor, and to relieve him from the pressure of creditors. They neither originate in nor rest upon any general right in the individual to contract; neither do they at all depend finally upon any general and independent power of the individual, in virtue of his proprietary right to handle his property in any honest way his judgment may dictate. On the contrary, they are provisionary limitations of this power to contract and dispose of property, and such as the Legislature consider are justified on the ground of their general utility and advantage. They belong to the same family, and are often nearly, if not altogether, identical with what, by way of eminence, are called Bankrupt Laws. They are induced by the same or resembling motives, and operate in the same direction. In short, they are so similar in design, complexion, and operation to laws which may be described as Bankruptcy Laws, that no court has yet been able to make any distinct dividing line.

In consequence of this sameness, the common character of the objects and the identity of the sphere of operation of these differently named laws, and in consequence of the supremacy due to laws made by Congress, pursuant to the Federal provision respecting a Bankrupt Law, and in furtherance of the policy of that provision, and to avoid conflicting proceedings, it has been considered that the existence of a congressional system ought to supersede or suspend the diverse systems established in the several States, and place the subject on common and equal ground throughout the whole Union. Now, the regulations affected by this rule in the different States are extremely various. In some, the Legislature, it is believed, has gone so far as to absorb these common-law assignments for the benefit of creditors into the

local system of insolvency regulations, or has connected the two by strong positive provisions. In other States the subject has been left at large, without any attempt to efface the natural distinction between the disposition made in virtue of ownership and the power of contracting, and the disposition commanded by positive law. Where this state of things exists, a common-law assignment for the benefit of creditors is something by itself, and resting on a distinct foundation. Such is the case here. An assignment of the kind before the court is not a proceeding, nor any step in a proceeding, under or in connection with the proper insolvent laws of this State. The right of the debtor to make an assignment for the equal benefit of all his creditors, stands here by itself and on its own basis of the common law. It depends upon principles which would remain efficient if our insolvent laws were all repealed. And these principles possess a vital energy which precludes their suspension by the mere existence of a Federal Bankrupt Law. *An act founded on them* may no doubt be decreed in a Court of Bankruptcy to be an *act* of bankruptcy; but we are not here dealing with anything of that kind. What is this basis for conveying in trust for creditors to which allusion is made? It is the right which every man, having the general capacity to contract, has to make honest and unforbidden contracts, and the right of disposition which is incident to ownership. "The right to make a general assignment of all a man's property results from that absolute ownership which every man claims over that which is his own." Marshall, C. J., in *Brashear* v. *West*, 7 Pet., 608, 614: "Every debtor has a legal right to assign property for the security of debts due by him, and so far from such an act being reprehended by the law, it is justified and approved." Story, J., in *Brown* v. *Minturn*, 2 Gall., 557. (See also *United States* v. *The Bank of United States*, 8 Rob. (La.), 262, 404; *Nichols* v. *Mumford*, 4 Johns. Ch., 522, 529; *Robbins* v. *Embry*, 1 Sm. & M. Ch., 207, 258; *Pickstock* v. *Lyster*, 3 Mau. & Sel., 371; *Giddings* v. *Sears*, 115 Mass., 505.)

It is steadily to be borne in mind that we are not inquir-

ing, and are not called upon to inquire how a Federal court would or might regard this assignment if it were regularly brought into question under bankruptcy proceedings against the assignor, and where its force would be directly examinable on an issue distinctly raised on the Bankrupt Law.

That is a question, as before stated, with which we have no concern. It is one which might regularly arise under the Bankrupt Act, and in a proceeding calling its energies into play.

The true question here is not whether the assignment was an act of bankruptcy, but whether the bare circumstance that the act was standing on the statute book of the Union, deprived the owner of all power to convey his property to one in trust for the equal benefit of all his creditors, in perfect honesty and good faith, so that independently of any attempt by any one in any place to put the Bankrupt Law in motion, his conveyance must be deemed *absolutely void*, and not even sufficient to give the holding by the assignee any coloring of right in contemplation of law.

The grounds of the argument to uphold the affirmative have been examined, and they are not satisfactory.

No adjudged case sustaining any such view has fallen under observation, whilst, on the contrary, a good many have been noticed which more or less strongly imply the opposite. Three or four may be particularly referred to.

In *James* v. *Whitbread*, 11 C. B., 406, property conveyed by one subject to the Bankrupt Law in trust for his creditors, was taken on execution against the assignor, and it came up on interpleader whether the assignment was valid so as to defeat the levy. No point was made upon the necessary invalidity of the assignment as a consequence of the existence of the Bankrupt Law. The court sustained the validity of the assignment. *Coale and another* v. *Williams*, 7 Exch., 205, was a similar case, and the ruling was the same. The principle contended for in the case at bar, if sound, was applicable to these English cases.

In *Buchanan* v. *Smith*, 7 N. B. R., 513; 16 Wall., 277, a

paper manufacturing company in New York made a general assignment for the benefit of creditors, and Buchanan & Co., in the face of the assignment, proceeded in the State courts to get judgments against the assignors, and levied execution, and secured the appointment of a receiver. Bankruptcy proceedings were instituted against the company, an assignee was appointed, and he filed a bill in the Federal court to subject the estate, and remove the obstacles raised by the assignment and the proceedings on the part of Buchanan & Co. in the State courts. No one pretended that the assignment was void as a consequence merely of the existence of the Bankrupt Law. The court disposed of it by saying that both sides had conceded that it was repugnant to a certain *local law of the State.*

In *McLean* v. *Meline et al.*, 3 McLean, 199, a bill was filed by an assignee in bankruptcy to set aside an assignment claimed to have been made by the bankrupt in contemplation of bankruptcy. The theory of the proceeding was the direct enforcement of the Bankrupt Act against the assignor and his estate, and it was based on the act itself. It was a specific assertion of the powers of the act in the appointed jurisdiction against an object of those powers, and not an attempt through a special proceeding under State law to set up the existence of the Bankrupt Law as enough to defeat the assignment. And I understand the court thought the assignment invalid when thus directly and distinctly assailed in bankruptcy, but at the same time conceded it would be valid on the basis of the State laws and when not tried in bankruptcy. There are many cases having the same bearing.

Now, if the position taken by the plaintiffs in the case at bar is valid, it is remarkable that in the case cited, and many similar ones, neither court nor counsel should have any suspicion of it. So plain and ready a ground of decision could not have been overlooked. It must have been taken for granted that the simple existence of a Bankrupt Law could not render a common-law assignment *ipso facto* void.

I think the point raised is untenable, and that the judgment below should be affirmed with costs.

UNITED STATES DISTRICT COURT—INDIANA.

A creditor may reduce his demand within the jurisdiction of a magistrate, take a judgment by default therefor, and obtain a priority by an execution issued thereon.

Where the law allows a judgment-creditor to issue an execution immediately, when it shall be made to appear that delay will endanger the collection of the judgment, he may do so, and obtain a priority thereby.

The fact that the affidavit was filed, and execution issued and levied, on the same day on which the proceedings in bankruptcy were commenced, does not prove collusion.

BENNETT F. WITT, Assignee of WILLIAM M. AUGHINBAUGH, Bankrupt, v. HENRY HERETH.

Morrow, Trusler & Henry, solicitors for assignee.
Bixby & Norton, solicitors for Henry Hereth.

GRESHAM, J.—On the 31st day of July, 1875, Henry Hereth filed his complaint before William H. Schmitts, a justice of the peace in and for Center township, Marion county, Indiana, demanding judgment against William M. Aughinbaugh for two hundred dollars upon a note, the principal of which was two hundred dollars and eighty-three cents, and on the same day a summons was duly issued to a constable of said township, and served on said Aughinbaugh. On the 3d day of August, at nine o'clock A. M., that being the time at which said cause was set for trial, the said Aughinbaugh was duly called and defaulted, and judgment was entered for the plaintiff for two hundred dollars and costs of suit.

Subsequently, on said 3d day of August, the plaintiff filed his affidavit with said justice, averring that the collection of his judgment would be endangered by further delay in the issuing of execution. Thereupon an execution was issued on said judgment, which was immediately levied upon the goods and chattels of the said Aughinbaugh sufficient to sat-

isfy the debt and costs. And later, on said day, the said Aughinbaugh filed his voluntary petition and was adjudged a bankrupt.

On this agreed statement of facts the court is asked to decide whether the lien of the execution and levy was displaced by the subsequent proceedings in bankruptcy.

Justices of the peace in Indiana have jurisdiction to try and determine suits founded on contract, when the debt does not exceed two hundred dollars. (2 G. & H., 579.)

Unless otherwise directed, justices shall issue execution on all judgments, when the defendant has appeared, after the expiration of four days from the rendition thereof; and in cases of default after the expiration of ten days; but when it shall be made to appear by affidavit that delay will endanger the collection of the judgment, execution shall issue immediately. (2 G. & H., 600.)

It is insisted that the justice had no jurisdiction to render the judgment, because the note sued on exceeded the sum of two hundred dollars, and that the statute did not allow the plaintiff to remit part of his claim so as to reduce it to two hundred dollars, for the purpose of giving the justice jurisdiction.

Even if it had appeared that the plaintiff had thus reduced his claim by remitting the interest and part of the principal, I would have no doubt on the question of jurisdiction.

The amount demanded determined the jurisdiction of the justice, and not the principal of the note or the amount actually due on it. If the plaintiff saw proper to reduce his claim to a sum within the jurisdiction of the justice by remitting part of it, no one had a right to complain, for no one lost anything but himself.

(*Wetherill* v. *the Inhabitants, etc.*, 5 Blackf., 357; 6 *Ib.*, 63.) Clearly the plaintiff was barred from maintaining another action on the same note, even if his judgment was for less than was due him. The facts agreed upon fail to show that the plaintiff remitted any part of his claim, and the presumption is that he demanded all that was due him.

It is further insisted that the filing of the affidavit, the issuing and levy of the execution upon the same day upon which the judgment was rendered, and the subsequent commencement of voluntary proceedings in bankruptcy on the same day, show collusion between the plaintiff and the bankrupt, and something more than passive non-resistance on the part of the latter. I do not think so. All these circumstances might have existed without collusion. It must be admitted that the circumstances excite a suspicion that the bankrupt was trying to aid the plaintiff in obtaining a lien, but they go no further. It may be that the plaintiff knew of the insolvent condition of the bankrupt before he commenced his action, and that he hoped, by diligence, to get an advantage over the other creditors. He pursued a remedy that the law gave him. The other creditors were not equally diligent, and none of them saw proper to institute proceedings in bankruptcy, and invoke the aid thereby of this court, to prevent the plaintiff from obtaining his judgment, execution, and levy, and the law imposed no duty on the bankrupt to go into voluntary bankruptcy to defeat the plaintiff in his efforts to procure a lien. (*Wilson* v. *City Bank, etc.*, 9 N. B. R., 97, Wal., 473.)

It was as much a part of the plaintiff's remedy to file his affidavit and cause his execution to be issued and levied before the expiration of ten days, as it was to obtain his judgment.

An order will be entered requiring the assignee to pay said judgment and costs out of any funds in his hands not otherwise appropriated

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UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

A formal bill of review may be treated as a petition for review.
Where the assignee denies the validity of a claim and asserts title to the property, the claimant cannot proceed by a summary petition.
If the bankrupt received property as security for indorsements and notes

made by him for the accommodation of the owner, the holder of one of these notes is not entitled to a summary order directing the payment of his claim out of the property.

GEORGE N. HURST v. *PARKER W. TEFT, Assignee of JOHNSON W. HOYT.*

W. G. Tracy, for the plaintiff.
Nicholas E. Kernan, for the defendant.

WOODRUFF, J.—*First.* I am not prepared to say that the bill of complaint herein should be dismissed upon the ground that a summary order of the District Court in a proceeding in bankruptcy cannot be reviewed by bill filed for the purpose. It is true, that the approved practice in this circuit, and the practice that has been uniformly sanctioned by this court, has been to bring the proceedings of the District Court before this court by simple petition. That practice is most economical, speedy, and convenient. Such a review was intended to be summary, as the proceeding to be reviewed is summary; and yet it has not heretofore been held that such review by bill is not warranted by the terms of the 2d Section of the Bankrupt Law, which gives this court jurisdiction to review such summary orders by "bill, petition, or other proper process." On the other hand, I do not doubt the power of this court to prescribe by rule the mode in which such a review shall be sought. Nor do I think it doubtful, that, in the absence of any specific rule of the court, we are at liberty to treat this present bill, though brought in all the forms of a plenary and original suit in equity, as being in substance a petition for the review of the summary order made in the District Court, and not to be dismissed because the petitioner has proceeded more formally than was necessary. This view of the nature of the proceeding here taken shows that the bill is not a "bill of review," technically so called, which is a proceeding in a plenary suit already brought, and for the review of the decree in such suit; and it is not, therefore, within the authority of the cases applicable to such a bill of review, on which the respondent relies. It is, on

the other hand, a special proceeding founded on the statute, taken for a special authorized purpose, and, though needlessly formal, it should not, I think, be dismissed on that ground. I trust, however, the case will not become an inconvenient precedent. Such a practice tends to unnecessary and mischievous delay in the settlement of estates, and in proceedings intended to secure the speedy appropriation of the property of bankrupts to the payment of their debts.

Second. On the other hand, the controversy itself appears to have been, in the first instance, erroneously begun. The claim of the present petitioner was not the proper subject of summary jurisdiction in the District Court, as that claim is now presented. The jurisdiction of that court, under the 1st Section of the Bankrupt Law, over the property of the bankrupt, does, in terms, extend to the ascertainment and liquidation of the liens and other specific claims *thereon.* But the theory of the petitioner is, that the property which has come to the hands of the assignee is *not* the property of the bankrupt, but belongs to the firm of Reddington, Fobes & Co., and that it was in the possession of the bankrupt as security for the notes and indorsements which he had made for the accommodation of that firm, and that, by the recovery of his judgment upon one of the notes, the petitioner has become entitled to have that property of Reddington, Fobes & Co. applied to the debts which were secured thereby. This claim is, therefore, not the setting up of a lien upon the property of the bankrupt, but a claim wholly adverse to the title of the assignee and in denial of property in the bankrupt. Such a claim should, I think, have been prosecuted under the 2d Section of the Bankrupt Law, when the assignee denied its validity and asserted title to the property, as property of the bankrupt. If the property in question belonged to the bankrupt, then the whole theory of the case now sought to be made by the petitioner fails. If the contest is, whether the bankrupt ever had title, or was a mere bailee or pledgee, holding it to secure advances, and having power of sale for account of the real owners, then the contest was of that ad-

verse character which has been often held not to be within the summary jurisdiction conferred on the District Courts by the 1st Section of the Bankrupt Act.

Third. Upon the case, as now claimed by the petitioner to have been made, it would have been eminently unjust for the District Court to summarily order the property to be applied to the particular note held by the petitioner. Upon his own theory, the goods in the possession of the bankrupt belonged to Reddington, Fobes & Co. (or to their assignee in bankruptcy), subject to the lien of Hoyt for indemnity against any and all of the notes and indorsements outstanding—not subject to a specific lien to protect him against the particular note held by the petitioner. There is no proof, whatever, and, indeed, no claim, that there was any pledge of particular property to secure Hoyt against any particular note or indorsement. Upon the theory of the petitioner, every holder of any of Hoyt's notes or indorsements has the same rights which the petitioner claims. Such notes appear to amount to very much more than the fund in the hands of Hoyt's assignee. In this view, then, it is not a case in which it would have been proper for the court summarily to direct the payment of the judgment recovered by the petitioner.

Fourth. The petitioner himself, on the recovery of his judgment against Hoyt, the bankrupt, levied his execution upon the goods in question, as *his property*. This was wholly inconsistent with the claim which he now makes. I do not say that this is a conclusive fact, or that it estops his present claim, but, in a case in which there was conflict of testimony, and, at least, doubt whether the property was not so purchased by Hoyt as to vest in him the title, such a levy by the petitioner was a very impressive admission by him that the property belonged to the judgment-debtor.

Fifth. Finally, I am not satisfied that the conclusion of the District Judge, that this note was, as testified in substance by Hoyt, given for goods actually purchased, was erroneous, or that all goods ordered after the Spring of 1871 were not purchased. No doubt, he had given Reddington,

Fobes & Co. accommodation paper. Hoyt's testimony is to the effect that the note held by the petitioner was not of that character. The circumstance that he had given such paper in advance or in anticipation of the maturity of his obligation to pay for his purchases, would not reduce his title to the goods to a mere lien.

Without entering into further detailed discussion, I am of opinion that it was not erroneous to deny the application of the petitioner for an order that the assignee apply the property to the payment of his judgment, and that such denial should be affirmed.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A voluntary bankrupt who has contracted new debts since the filing of the prior petition, may file a new petition in bankruptcy.

In re P. C. DRISKO.

THIS was a voluntary petition for the benefit of the Bankrupt Act. A creditor having an attachment on mesne process upon the chattels of the bankrupt, petitioned that the proceedings may be stayed and annulled, on the ground that the bankrupt has before applied for the benefit of the act in March, 1872, and that in February, 1875, his discharge was refused by reason of certain frauds specified and proved against him. To this it was replied that Drisko had contracted new debts since the date of the former proceedings, and before his second petition was filed, amounting to more than three hundred dollars. The facts alleged on both sides were admitted to be true, and it was further agreed, the bankrupt had some property upon which these proceedings might operate, if they could be sustained, being in fact the same property which the objecting creditor had attached.

E. Avery & ——— Johnson, for the objecting creditor,

cited *Re* Farrell, 5 N. B. R., 125; *Re* Thompson, 58 Law Times, 399; *Re* Sydney, L. R., 10 Ch., 208; *Re* Russell, L. R., 10 Ch., 255.

Eaton & Hamilton, for the bankrupt, cited *Fisher* v. *Currier*, 48 Mass., 424; *Gilbert* v. *Hebard*, 49 Mass., 129.

LOWELL, J.—A very interesting question is presented by this petition, which I understand is likely to be carried to the Circuit Court; I have thought it my duty, however, to consider it with as much attention as if my decision would be final.

It was twice decided in Massachusetts, that when a discharge had been refused to a bankrupt or insolvent, he might yet apply again for the benefit of the statute, if he had contracted new debts sufficient in amount to give the court jurisdiction. (*Fisher* v. *Currier*, 48 Mass., 424; *Gilbert* v. *Hebard*, 49 Mass., 129.)

In the former of these cases, the arguments on the one side and the other were given by Shaw, C. J., with his accustomed thoroughness, and the conclusion reached was, that the policy of the law would be best subserved, and its true intent be met, by distributing newly-acquired assets equally among the new creditors, and such of the old creditors as chose to come in, and by permitting a discharge from the new debts. It was taken for granted, that the decree of discharge could not operate upon debts which were proved or provable under the earlier bankruptcy, because as to those it was *res judicata*, that the bankrupt was not entitled to it; and it was said that the discharge in the new proceedings must be limited in terms to the new debts, unless the old creditors, or some of them, elected to come in and share in the new assets.

The reasoning of the Chief Justice, and the decisions in those cases, have proved satisfactory to the profession, I believe; and they are entirely so to my mind.

But there have been cited here some provisions of the Bankrupt Act, and some recent decisions in England, which.

are relied on to countervail the older arguments and decisions.

By Section 5116 of the Revised Statutes, it is enacted, that no person who has once been discharged, and becomes bankrupt again upon his own petition, shall be entitled to a discharge, unless his estate is sufficient to pay seventy per cent of the debts proved, or unless three-fourths of his creditors assent; but a bankrupt who proves that he has paid all his old debts, or has been voluntarily released from them, may have a discharge as if he had not before been bankrupt.

The argument from this section is, that it cannot be believed that Congress intended to put a bankrupt who had been refused his discharge for fraud in a better condition than one who had received it for upright and honorable conduct, and, therefore, as no disability is imposed on one who becomes bankrupt a second time, not having received his discharge the first time, it is to be taken that Congress intended that such a person should not become bankrupt at all.

This construction appears to me to stretch an inference beyond its legitimate bearing. The insolvent law of Massachusetts, from which so much of the Bankrupt Law was taken, had a provision somewhat similar to that of Section 5116, but applied it to all second insolvencies, and not merely to those where there had been a discharge, nor to voluntary cases. It seems probable that the idea in the mind of the framers of the Bankrupt Law in thus modifying the insolvent law was, that a man who had never been discharged, had never had the full benefit of the statute. They overlooked, perhaps, the question of fraud, and said a man may be bankrupt a second time, whose first bankruptcy was compromised or dismissed for one reason or another, or who neglected to apply for his discharge in due season. That there may be such cases is shown by the authority cited. (*Re* Farrell, 5 N. B. R., 125.)

It would have been easy to say that no one whose dis-

charge had been refused for cause should again become bankrupt, and that the decisions in Massachusetts should not be applicable if such *had* been the intent, and there is nothing in any part of the statute to prevent a man becoming bankrupt a second time, and many implications that he may. I think it, therefore, a sounder construction to hold that this particular case was overlooked, than that a prohibition against all bankruptcy by a person once refused his discharge, should be inferred from a section which says nothing whatever about that class of cases.

It was admitted at the argument that a man may be made bankrupt a second time by his creditors, if he has committed new acts of bankruptcy, and has newly-acquired property on which the proceedings may operate. Now, under our system, a voluntary petition is an act of bankruptcy, and I have repeatedly held, and it is the foundation of an ordinary practice in this court, that after such a petition has been filed, any creditor may carry on the proceedings, if the debtor fails or neglects to do so. None of the able and learned members of the bar, practicing in bankruptcy, have ever objected to this practice, and most of them have availed themselves of it.

Indeed, I look upon it as a fundamental and most important part of our system, that although the mere fact of insolvency is not enough to authorize proceedings *in invitum*, yet if the debtor admits by a solemn act in court that he is hopelessly insolvent, the system takes effect, and his assets are to be equally divided. And I am prepared to say, that there is no case in which an involuntary petition may be maintained against any one in which a voluntary petition by him will not be. It is true that acts of bankruptcy may be committed by a solvent person; but when a person solemnly in court admits his insolvency, no one can contradict him; and if he was solvent the moment before he filed his petition, he is insolvent the next moment.

The English system differs from ours in two respects, among others. *First.* Excepting during the eight years that the

Statute of 1861 was in operation, no one has ever been permitted to become bankrupt on his own petition. Connected with this was the notion which runs through all the decisions, that the proceeding is to be begun solely for the benefit of the creditors. Bankruptcies concerted with the debtor, have been repeatedly set aside in England; never one in this country. And it has been held in England, that a creditor ought not to begin proceedings unless there are assets to distribute. The mere discharge of the debtor is not ground enough for a bankruptcy.

Second. The property of a bankrupt who had not received his discharge belonged to his assignees to the end of the bankrupt's life, and consequently, a second bankruptcy was void at law, and would be enjoined in equity, unless the assignees under the first bankruptcy had estopped themselves by their acquiescence in the debtor's contracting new debts on the credit of new property. This doctrine has been a good deal modified by the Statute of 1869; but even now, the bankrupt can acquire no property until his discharge, or the close of the first bankruptcy, and not then unless certain conditions are fulfilled.

It will be seen at a glance, that our law is much more favorable to the debtor, and encourages proceedings by him, for his own benefit as well as for the distribution of his property; and his future earnings and acquisitions are his own from the time of the filing of the petition.

Examined in the light of these marked differences between the English statute and ours, the cases cited will be found to support rather than to shake the conclusion to which I have come.

Under the statute of 1869, the debtor may propose a liquidation by arrangement, which has many of the features of our voluntary bankruptcy, but leaves more power with the creditors, and is not bankruptcy, unless the creditors choose. But so far as the provision goes it resembles bankruptcy, and if the liquidation is not closed, the property will all belong to the trustee, whether newly-acquired or not, un-

less the creditors vote a discharge. Under the law it was held, in the cases cited, that while one composition remained unsatisfied, a new one could not be upheld, even though it brought in new creditors or new property, unless this new property had been released by the old creditors, and in that case it might be the subject of a new arrangement.

Now, our statute itself releases after-acquired property from the operation of the old proceedings. When, therefore, the cases cited decide that newly-acquired property, which is not subject to the old liquidation, may be the subject of a new one, they decide the point in the same way, *mutatis mutandis*, as the courts of Massachusetts decided it.

It is true that by our law the new property remains liable to process if the debtor does not receive his discharge, but this is not at all the liability of the English law. With us it remains liable to ordinary process by any creditors, old or new, who may be in a situation to attach or levy; while in England, in unfinished bankruptcies it remains solely the property of the old creditors represented by the assignee. With us, when there are new debts and new assets, there are the same reasons for a second bankruptcy that there were for the first, while in England, the second can have no operation until the close of the first, however long it may be kept open, and whatever may happen in the meantime.

Which system is better in itself, I do not say; but probably each may be the fitter for the country in which it obtains. Our system undoubtedly leads to second bankruptcies, but it has been found to work well, and is more just to the new creditors, while not unjust to the others.

I have thus far assumed the truth of the facts admitted by the parties, but I now find on examining the record and my notes, that the discharge of Drisko was never formally refused. A hearing was held, and it was proved that all or nearly all the creditors, excepting the firm now opposing the petition, had been paid, but that a fraud has been committed with the intent to prevent these very creditors from recovering their debt, and it was intimated by me that

Drisko was not entitled to his discharge. Upon which the parties agreed to try the case pending between them in the State court, as if the bankrupt would not receive his discharge. No one ever asked me to enter an order refusing the discharge. Under these circumstances I doubt whether this case should be permitted to proceed until the old case is disposed of.

Upon hearing the parties again as to this last point, I find that the case which was pending in the Superior Court of this State by these objecting creditors against Mr. Drisco, proceeded to judgment as if his discharge had been refused, and by the effect of that judgment these creditors hold the sureties on his bond, who would have been discharged if that judgment had not been obtained. It happens unfortunately that the sureties are now bankrupt, and these creditors have not obtained as much advantage as they expected, but they have all the legal results of the debtor's failure to obtain his discharge.

Under these circumstances I think I am bound, at the bankrupt's request, to refuse the discharge in the former proceedings *nunc pro tunc*, and it is so ordered.

UNITED STATES DISTRICT COURT—NEW JERSEY.

The fact that a State court had, prior to the filing of the petition, acquired jurisdiction over a corporation in a suit commenced therein for the purpose of distributing its estate as an insolvent corporation, and a receiver appointed therein, is no ground for dismissing a petition for an adjudication of bankruptcy filed against it.

Secured creditors are not to be reckoned in computing the number of creditors who must join in an involuntary petition.

In re GREEN POND RAILROAD COMPANY.

Henderson & Fennell, for petitioning creditors.
B. Williamson, for bankrupt.

NIXON, J.—This is a petition filed by certain creditors of the

Green Pond Railroad Company, praying that the said corporation may be adjudged a bankrupt. The court is asked to dismiss the petition on two grounds:

First. Because the Court of Chancery of New Jersey, prior to the filing of the said petition, had acquired jurisdiction over the debtor in a suit commenced therein, for the purpose of distributing its estate as an insolvent corporation, in which suit a receiver had been appointed, who is now in the possession of the said estate.

Second. Because the petitioning creditors do not constitute one-fourth of the creditors of the alleged bankrupt, and the aggregate of their debts do not amount to one-third of all the debts provable under the Bankrupt Act.

The counsel for the bankrupt undertakes to sustain the first ground by invoking the long-established principle or rule, that where two courts, having concurrent jurisdiction, entertain separate suits, which involve the custody or sale of property, whether by execution, attachment, or receivership, that court which first obtains actual possession of the property is entitled to administer it, and will not yield its authority to the other tribunal, nor will the other tribunal attempt to interfere.

All this is conceded, but it is suggested that the principle is not applicable to the case before me.

It is shown that a bill was filed in the Court of Chancery of New Jersey on the 13th of February, 1875, by certain creditors, against the alleged bankrupt, as an insolvent corporation, praying for the appointment of a receiver, and for a writ of injunction; that such steps were taken therein, that a receiver was appointed February 22d, and a writ of injunction issued February 23d, 1875, and that when the petition in bankruptcy was filed in this court, the receiver, under the State law, had an absolute control over all the property of the debtor.

This proceeding in the State court was under the act entitled "An act to prevent frauds by incorporated companies" (Nixen Digest, 402), which was passed as early as the

16th of February, 1829, and which has always been held to partake of the character of a Bankrupt Law. A cursory examination of its provisions shows, that it embodies all the elements of a Bankruptcy Act, insolvency, surrender of property—its administration by receivers or trustees—and the distribution of the assets among creditors. (*The State Bank* v. *Receivers, etc.*, 3 N. J. Eq., 266; *Receivers* v. *Paterson Gas Light Co.*, 23 N. J., 283; *Receivers* v. *Paterson Savings Bank*, 10 N. J. Eq., 13.)

"The act to prevent frauds by incorporated companies," says Chief Justice Green in the case of *Receivers* v. *Paterson Gas Light Co.*, *supra*, "so far as it relates to the estate of an insolvent corporation is, in all its essential elements, a Bankrupt Law. It leaves the creditor, indeed, the naked remedy of proceeding to judgment against a corporation, stripped at once of its property and the right of exercising its franchises; and thus avoids the constitutional objection, of interfering with the obligation of contracts. But, like a Bankrupt Law, it vests the whole property of the corporation, *by operation of law*, in the hands of assignees, to be distributed among the creditors upon principles of justice and equity."

Although the National Constitution vests in Congress the authority to establish uniform laws on the subject of bankruptcies throughout the United States, it is conceded that the several States may legislate in regard to bankruptcy and insolvency, as long as Congress fails to exercise its power. But when Congress does act in the matter, the expression of its will is the supreme law of the land, and everything in the legislation of the States inconsistent with it must yield to its superior authority.

The Bankrupt Act of 1867 makes provisions for winding up the affairs of insolvent corporations, different in many respects from the State law now under consideration. Indeed, its plain object and intent are to place their administration under the *exclusive* jurisdiction of the Federal Courts of Bankruptcy, and hence it has been held, that the appointment of a receiver under the State laws, by a State court, to

take possession of the assets of an individual or a corporation, to be applied to the payment of the debts, is, itself, an act of bankruptcy within the meaning of the eighth clause of the 39th Section of the act, and subjects the individual or corporation, permitting or suffering such appointment, to an adjudication of bankruptcy. Such a proceeding is analogous in its character and effects, to an assignment under the insolvent laws of a State, which is always treated as an act of bankruptcy.

The case then, being one of bankruptcy, over which the jurisdiction of the Federal courts is *exclusive* as long as the Bankruptcy Act remains in force, no question respecting the concurrent jurisdiction of the State and Federal courts can arise. (*In re* Merchants' Insurance Co., 6 N. B. R., 43.)

The second ground for dismissal is also untenable.

The amendment of June 22, 1874, to the 39th Section of the Bankrupt Act, requires that the creditors joining in the petition, shall constitute one-fourth thereof at least in number, and the aggregate of whose debts *provable under the act* shall amount to at least one-third of the debts so provable.

The answer of the defendant clearly shows that the debts of the alleged bankrupt due to the petitioning creditors largely exceed in amount the one-third of the unsecured claims against the company, and that more than one-fourth of the creditors have joined in the petition.

It has been held *In re* Frost, 11 N. B. R., 69, and I think properly, that Congress, in using the expression "debts provable under this act," meant to include only the *unsecured* creditors. The secured creditors, in truth, have no interest in the proceedings, and hence should not be allowed to control the action of those who have an interest.

As the answer admits the third act of bankruptcy alleged in the petition, and the insolvency of the debtor, an adjudication must be ordered. (*In re* Independent Ins. Co., 6 N. B. R., 169; *Id.*, p. 260.)

UNITED STATES CIRCUIT COURT—N. D. NEW YORK.

The claim which is presented to the Circuit Court on an appeal from the rejection thereof, must be the same as that which was presented to the District Court.

Where a savings bank is prohibited from loaning money on personal security, a note taken therefor is void, and does not constitute a provable debt.

Where a savings bank is prohibited from making a loan on personal security, a claim for money so loaned is not provable.

In re JOHN JAYCOX and JOHN A. GREEN.

Daniel Pratt, for the appellants.
Frank Hiscock, for the assignee in bankruptcy.
William C. Ruger, for creditors.

WOODRUFF, J.—*First.* It is impossible to discover, from the papers submitted herein, that the Circuit Court has any jurisdiction, or of what proceeding. It was stated by counsel on the argument, and is assumed in the briefs, that an appeal has been taken to this court by the assignees of "The People's Safe Deposit and Savings Institution of the State of New York," from an order of the District Court disallowing their proof of debt against the estate of the bankrupts; and there are among the papers a statement of claim, and an answer thereto, intended to conform to the 24th Section of the Bankrupt Law, relating to such appeals. On the trial which that 24th Section provides for, the parties waived a jury, and gave in evidence a part only of the proceedings in the District Court relating to such claim. Probably, the defects in the papers would be supplied, so far as the case is susceptible of supplement, and I will, therefore, deal with the case according to the information I have of its nature and condition.

Second. But I cannot omit to observe, that this court has no original jurisdiction to receive and allow debts against the estate of a bankrupt. The claims of creditors must first be presented in the District Court; and it is not proper to present one claim in the District Court, and, under cover of an ap-

peal to this court, transform the claim into a new and distinct cause of action. In other words, this court ought not, on appeal, to be called upon to decide questions, either of law or fact, that were not raised or involved in the decision of the District Court. The same cause of action is to be pursued in this court, though it may happen that new or further proofs in support of that cause of action may here establish facts not proved below, and new questions of law may arise thereupon. The cause of action, however, must be the same; otherwise, this court would assume to allow or reject a debt which had been neither allowed nor rejected in the District Court. To do this, I am of opinion this court has no jurisdiction.

Third. The only order which I find among the papers submitted, and the only order which, so far as I have any information, the District Court has made rejecting the claim of the assignees (the appellants), is an order which rejects certain promissory notes set forth as proof of debts due from the bankrupts to the People's Safe Deposit and Savings Institution. The ground of such rejection, appearing in the opinion of the court, is, that those notes are void and constitute no cause of action. But the order expunging the proof of those notes, and rejecting that proof, is declared, in the order itself, to be without prejudice to any right of the creditors so claiming to make proof of a debt or claim for money loaned to said bankrupts, or had and received by them to the use of the said corporation or its assignees, or proof of any other debt or claim, other than upon the notes or security taken or received on the making of discounts in violation of the restraining acts, or other statutes, of the State of New York. Instead of acting upon the suggestion of the court thus given, and amending their claim and proof of debt, so that it should not depend upon the question of the validity of those notes, the alleged creditors have, it would seem from the papers, come into this court and here set out or stated, for the first time, a cause of action for money lent and advanced upon these notes, and for money lent and advanced generally to the bankrupts, and for money had and received by the bankrupts to the use

of the claimants. They thus present here a cause or causes of action never presented to the District Court, and seek to establish a debt which that court has not rejected. I think, therefore, that this court would perform its whole duty by considering the only question which was decided in the District Court, namely, whether the promissory notes, which were alone stated as constituting the cause of action or debt presented below, were or were not void.

Fourth. I have, however, no wish to avoid the examination of the whole case, or the expression of my opinion thereon, by suggesting embarrassments which counsel or parties may deem technical. Very able counsel have discussed the case in this court, assuming that both of the questions which arise out of the transactions between the bankrupts and the Safe Deposit and Savings Institution were properly before me. The fact that proofs of debt in the District Court are not formal, and that promissory notes are themselves treated as evidence of money had and received by the promissor, gives some color to the claim that the District Court might have received them as such proof, and ought not only to have passed upon their validity, but upon the evidence taken by the Register that the said corporation did advance money to the bankrupts thereon, by discounting the notes. I, therefore, state my conclusions upon both questions, and, if counsel can make my decision useful in the case, as it has been conducted and is now urged, it will save time and expense.

Fifth. I find, then, the facts to be as stated in the report of the Register, and as recited in the opinion of the District Judge. The principal and important of them are, that the People's Safe Deposit and Savings Institution was incorporated by Act of the Legislature of the State of New York, passed May 14th, 1868, and its charter (Laws of N. Y., 1868, Vol. 2, Chap. 816, p. 1839), must, for any purposes for which my finding is material, be taken as part and parcel thereof; that such corporation opened offices for banking in Utica and Syracuse, and at such offices conducted a regular banking business, employing its capital and deposits therein; that

it kept a large number of accounts, not only for deposit of savings, but merchants' accounts, for discounts and deposits, after the usual custom of banks of discount and deposit in this State; that, in such banking business, it, prior to its failure and assignment to the appellants, had discounted, in the ordinary course of business, promissory notes and other commercial paper, at the banking office in Syracuse, to the amount of more than six hundred thousand dollars; that it so discounted, from time to time, several hundred thousand dollars in all, for the firm of Jaycox & Green (the bankrupts); that, of such commercial paper, so discounted for Jaycox & Green, promissory notes to the amount of over thirty-five thousand dollars remain unpaid, and are held by the said corporation or the appellants, the receivers of such corporation, of which notes, the promissory notes made by Jaycox & Green, now in question, to the amount of twenty-seven thousand seven hundred and seventy-two dollars and fifty cents, were presented and claimed as a debt against the bankrupts, in the District Court; and that the proceeds of the discounts thereof were paid to Jaycox & Green by checks or drafts on New York, less a charge of one-half of one per cent., charged as exchange on New York.

Upon these facts, *First*, I concur fully in the opinion of the late lamented and learned District Judge, that the said notes were wholly void, and, neither as contracts or securities, constituted any ground of claim or debt against the bankrupts. I do not deem it necessary to repeat the discussion embodied in that opinion. It may be taken as the opinion of this court upon the question. The charter of the corporation in no wise authorized the carrying on of that business. The Constitution and the statutes of the State of New York forbade it. Heavy penalties were declared by statute against the corporation and its officers, for carrying it on. The acts by which the notes were received by the corporation were illegal; and the statutes, in express terms, declare such notes void. The decision of the District Court was, upon this point, as I think, beyond all question, correct.

Second. The said corporation, thus violating the laws of the State, can no more allege an implied contract to pay the money mentioned in the notes, than it could set up and rely upon the express promise of Jaycox & Green to do so. To say, that, when a statute declares that all notes and other securities for the payment of any money, made or given to secure the payment of any money loaned or discounted by any incorporated company, or its officers, contrary to the provisions of the statute, shall be void, the courts may, nevertheless, imply a contract to pay it, is practically to repeal the statute. Such a holding throws open the business of unauthorized banking to be fearlessly conducted and without danger of loss. Such a holding makes the stringent provisions of the Constitution and Statutes have this effect and no more—the mode of pleading in an action to recover the money is altered. Unauthorized corporations may discount notes without limit; but, if a note should be protested, they must sue for its amount as for so much money lent, or had and received, and will recover. Nearly all of the efficiency of the statutes, as a restraint, is eliminated by such a holding.

I shall not enter upon an examination of all the cases which have been referred to as bearing upon this subject. It is proper, hower, to notice what are commonly spoken of as the Utica Insurance Company cases (15 Johns., 358; 19 *Id.*, 1; 8 Cow., 20; 3 Wend., 296; *Id.*, 369; 4 *Id.*, 652). It was undoubtedly held, in reference to notes taken by that company, that, although the notes were void, the money advanced on discounting the same could be recovered, as money lent; and the court go as far even as to say that the void notes could be used as evidence of money lent, and so be made, as evidence, the effective means of a recovery of the amount thereof. As to these cases I have two observations to make: *First.* They have long been the subject of criticism, and doubts of their correctness have been freely expressed, both at the bar and on the bench. In *New Hope Co.* v. *Poughkeepsie Silk Co.* (25 Wend., 648),

Mr. Justice Nelson, lately the venerable and distinguished Justice of the Supreme Court of the United States, assigned to this Circuit, then in the Supreme Court of this State, says: "Whether the doctrine of these cases is well founded, and may be upheld upon established principles, or not, or whether the result was not materially influenced by the peculiar phraseology and powers of the charter of the Utica Insurance Co., in respect to which they arose, it is not necessary at present to examine. I am free to say, in either aspect I should have great difficulty in assenting to them." In *Tracy* v. *Talmage*, in the Court of Appeals of this State (14 N. Y., 162, 189), Mr. Justice Samuel L. Selden says: "These cases have never been overruled; and yet, I think I may say, they have generally been regarded with some suspicion as to their soundness. * * * There is undoubtedly great difficulty in reconciling these cases with the settled rules in regard to illegal contracts."

Second. Those cases are distinguished from the present; and in a particular which has been referred to as constituting the possible ground upon which the decisions there made could be upheld, or, as I should better say, in the feature which was deemed to furnish the ground on which those cases proceeded, namely, that that company had a general power to lend money, and, therefore, though it received therefor a void security, it could reclaim the loan. Without assenting to the reasoning by which this result was reached, it is sufficient to say, that the premises are wanting in the present case. In *Beach* v. *Fulton Bank* (3 Wend., 573, 583), contemporaneously with some of those decisions, Chief Justice Savage states their ground as above indicated, and declares, that, as the Hudson Insurance Company had no such power, those cases do not apply.

The charter of the People's Safe Deposit and Savings Institution declares in what that corporation may invest its funds. This is fully discussed and made clear in the opinion of the District Judge. It has no power to loan money on personal security; and the very ground on which the court

placed their decision in the Utica Insurance Company cases, therefore, fails. In accordance with this view, the Supreme Court of this State, in *Life & Fire Ins. Co.* v. *Mechanic Fire Ins. Co.* (7 Wend., 31), where the action was assumpsit, and the plaintiff claimed to recover for money lent, held, that, as the plaintiff had no power, by its charter, to loan money except on bond and mortgage, any other contract of loan was void, and could not be the foundation of an action; and, in the case of *Gillet* v. *Phillips*, in the Court of Appeals (13 N. Y., 114, 119), the court say, of a contract in violation of our banking acts: "The contract was not only unauthorized, but illegal. No action could be sustained upon it, if executory, in his favor, nor to set it aside, if executed. Nor could it become the foundation of an implied assumpsit in behalf of the offending party." The cases of *Brady* v. *The Mayor* (2 Bosw., 173, and 20 N. Y., 312), and *Donovan* v. *The Mayor* (33 N. Y., 291), by analogy, affirm the same doctrine.

My conclusion is, that the appellants have established no debt against the bankrupts, and a judgment for the assignee must be entered.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

The power of Congress over the subject of bankruptcies is not limited to those laws which were in force in Great Britain and the colonies, at the time of the Revolution.

Congress has the power to define what, and how much, of the debtor's property shall be exempt from the claim of his creditors.

A resolution of composition may provide for payment in installments, the postponed payments to be secured by indorsed notes.

The debtor is not discharged under a composition until the whole amount of the notes given to secure the deferred installments, are paid.

Where there is no fraud or concealment, the omission to place an asset in the statement is no ground for refusing to confirm it if the creditors are fully informed concerning it, and its value does not reasonably require an alteration of the terms of the composition. The testimony of the debtor given at the meeting, constitutes a part of his statement.

In re MORRIS REIMAN and ALBERT FRIEDLANDER.

THIS was a petition of review, seeking to set aside an

order of the District Court, confirming a composition claimed to have been made by the debtors with their creditors, in the manner directed by the Bankruptcy Act. On the 3d of August, 1874, a petition in bankruptcy was filed against the firm of M. Reiman & Co., composed of Morris Reiman and Albert Friedlander. An order to show cause why they should not be adjudged bankrupts was thereupon issued, returnable August 25th, 1874. But, prior to the return day of such order, a petition was filed by the debtors, praying that a meeting of their creditors might be called, to pass upon a proposition of composition, to be submitted in conformity with the provisions of Section 17 of the amendatory Bankruptcy Act of June 22d, 1874. After meetings of creditors duly held at various dates, resolutions of composition were confirmed by the District Court, on the 19th of December, 1874. Of this decree of confirmation A. T. Stewart & Co., creditors of Reiman & Co., sought a review in this court. The terms of the composition were as follows: "The said debtors propose to the creditors to pay thirty cents for every dollar in which the said debtors are indebted to said creditors, respectively, payable in three installments, the first in cash, and the last two to be payable, one in four months and one in eight months from the 1st day of September, 1874, and to be secured by notes of the said debtors, satisfactorily indorsed, dated September 1st, 1874, in full satisfaction and discharge of the several debts due and owing by said debtors to said creditors. The said notes to be indorsed by either Michael L. Doyle, of No. 267 Grand street, in the city of New York, or by Philip Gomprecht, of 944 Third avenue, or, in lieu of the said notes, the amount of the said compromise to be paid in cash, with a rebate of seven per cent. interest; and that such thirty per cent., to be paid or received, as aforesaid, be on each dollar of the indebtedness of the said debtors to said creditors, and be in full satisfaction and discharge of the several debts owing by said debtors to said creditors. The said ten per cent. in cash to be paid, and the said notes to be delivered, within ten days after the said resolution has been recorded, and the

said statement of the assets and debts has been filed." The objections raised by A. T. Stewart & Co. to the composition were: 1st. That Section 17 of the amendments to the Bankruptcy Act, approved June 22d, 1874, relating to compositions, is unconstitutional. 2d. That the composition accepted is not in conformity with the section regulating compositions, in that it provides for a payment to creditors partly in notes. A. T. Stewart & Co. further sought to review the proceedings, for the reason that there had been omitted from the statement of assets filed as a basis for the proposed composition, certain real estate claimed by the appellants to belong to Morris Reiman, in the city of New Orleans, Louisiana, valued at about sixty-five thousand dollars. This real estate was purchased in 1866, in the name of the wife of Morris Reiman, one of the alleged bankrupts, with moneys designated, under the laws of Louisiana, as "community funds." In 1868, Morris Reiman attempted to convey and settle this property upon his wife, in consideration of his love and affection for her. There was also some property standing in the name of Morris Reiman, at Yazoo City, Mississippi, which he omitted to enumerate in his schedules. It was claimed that these omissions were fatal to the confirmation of the resolutions of compromise.

Julien T. Davies, for the appellants.

Samuel Boardman, for the debtors.

HUNT, J.—It is contended by the appellants, that Section 17 of the Bankrupt Act of June 22d, 1874 (18 U. S. Stat. at Large, 182), is unconstitutional. The contention is, that the Constitution of the United States permits only the passage of a Bankrupt Act which shall require the surrender of the entire assets of a bankrupt, as a condition of his discharge from his debts. The section under consideration, it is contended, authorizes his discharge upon the surrender of a portion of his assets only.

Power is given to Congress to establish "uniform laws on the subject of bankruptcies throughout the United States."

The *subject* of bankruptcies is here committed in full to Congress, with the single condition, that the laws in relation thereto shall be uniform throughout the United States. Whatever relates to the failure of traders to pay their debts, to the commission of certain acts, or the existence of certain defaults, which shall be evidence of their inability to pay their debts, to the surrender of their property, and to their discharge from their debts, may well be said to be within the subject of bankruptcies. The argument, that the subject of bankruptcies is to be interpreted and limited by the British and Colonial statutes, as they existed at the time of the separation of this country from Great Britain, is quite too narrow. No country can afford to be thus cut off from all possible improvement in its legislation. Whatever relates to the subject of bankruptcy is within the jurisdiction of Congress; and, to say that the law as existing at the time of the Revolution, or the adoption of the Constitution, shall furnish the rule and limitation of legislation, would take a large part of the subject out of their jurisdiction. While it is true that all proper bankrupt laws and insolvent laws are based upon the theory of a surrender of the bankrupt's property, none of them require such surrender to be entire and absolute. The rigid principle of right, in these and the similar case of property subject to execution, is modified by a principle of humanity. All civilized nations require that a debtor shall apply his property to the payment of his debts, but few, if any, of them strip him entirely. If he is married, or has a family dependent upon him for support, certain kinds or amounts of his property are exempt from such application. He is allowed by law to retain them for his own benefit and that of his family. Unless carried to an extent which indicates a fraudulent collusion between the legislator and the debtor, this exemption meets with the approval of all good men. What shall be the nature and the extent of such exemption must necessarily be within the discretion of the law-making power. If moderate and reasonable in its character and degree, it does not conflict with the principle, that the debtor's property

must be applied to the payment of his debts. The intrusting of the "subject" of bankruptcies to Congress carries with it the power of defining what, and how much, of the debtor's property shall be exempt from the claim of his creditors.

It is difficult to see, also, how the power to make a compromise of debts necessarily allows to the debtor the possession of any of his property. He presents a list of the names and amounts of his creditors, and of his assets. His creditors consider the subject thus presented, and are authorized to examine the debtor under oath, to obtain better or more precise information. The whole matter being thus before them, they resolve that their interests require that a compromise shall be made, and that, if the debtor will pay them a certain percentage of their debts, they will accept it in satisfaction, and he shall be discharged. They deliberately resolve, upon an understanding of all the facts, that this is all that his property can be made to pay. Are they not as capable as a court of law of judging on that subject? Some one must decide the question of the amount of the dividend, and of discharge. Some one must say that the debt of an opposing creditor shall be discharged without payment in full; and the fact, that the body of the creditors determine the point, is no more oppressive to the opposing creditor than if the determination had been made by the court.

It is objected, secondly, that the compromise before us cannot be sustained, for the reason that it does not provide for payment of the amount agreed to be paid in money. Among other provisions of the section we are considering is the following: "Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts," etc. The appellants contend, that the compromise agreement, that the debtors shall "pay thirty cents for every dollar in which the said debtors are indebted to said creditors, respectively, payable in three installments, the first in cash," the others in

four and eight months, secured by notes indorsed by persons named, is not in compliance with this requisition. Their argument is, that "money" means money in hand, cash at the time of making the agreement.

The answers to this objection are, 1st, that the statute does not intend to require a payment in cash, but simply that the amount shall be made payable in money and not in property, the assets of the debtor. There shall be no traffic or dicker or speculation in property, by which a large nominal debt may be paid by small actual value, or by which one creditor may receive more than another. The amount or proportion to be paid shall be fixed in currency, and all shall receive alike. In the present case, thirty per cent. is the amount agreed to be paid. It is agreed to be paid in money, and nothing else. The giving of security that the amount shall be paid does not alter the position. The agreement is to "pay" thirty cents for every dollar of the debts. The notes do not alter the character of the payment. They simply make it more certain. It is the same as if the amount had been expressed to be payable in money, ten per cent. at the moment of making the agreement, ten per cent. in four months, and ten per cent. in eight months. 2d. Until the whole amount of the notes is actually paid, the debtor is not entitled to his discharge. The delivery of the notes does not of itself cancel the debt. No cases on this point under our statute are cited, but the English authorities are clear to the point. (*In re* Hatton, 7 L. R. Ch. App., 723; *Edwards* v. *Coombe*, 7 L. R. Com. Pleas, 519.)

The counsel for the appellants objects, thirdly, that the composition is void, and should be set aside on this appeal, for the reason, that certain property in Mississippi, valued by the appellants at three thousand dollars, and certain property in New Orleans, valued by them at sixty-five thousand dollars, are not described in the statement of assets and debts filed as a basis of compromise. The provision of the statute on this subject is as follows: "The debtor, or some one in his behalf, shall produce to the meeting a statement

showing the whole of his assets and debts and the names and addresses of the creditors to whom such debts respectively are due." A recital in the petition for review states, "that the amended statement of the assets and debts of the alleged bankrupts, produced by them to their creditors August 26th, 1874, was ordered to be filed with the clerk of said District Court." The order of December 19th, 1874, recites, that the bankrupts were present at the meeting of the creditors, "and answered all inquiries made of them, and produced to said meeting a statement, verified by oath, showing the whole of the assets and debts of the said bankrupts." The record also shows, that, at the meeting of the creditors, Mr. Campbell, of counsel for the opposing creditors, examined the debtor Reiman at length about the New Orleans property and the Mississippi property, showing the value and condition of the same, and the interest, if any, the debtor had therein. Witnesses were called to establish the law of Louisiana on the point of the debtor's interest in the New Orleans property, Mr. Hennen giving evidence tending to establish that he had a valuable interest, and Mr. Fellowes giving evidence tending to show that he had none. It is assumed, by the respective counsel, that the "statement of assets and debts" presented by the bankrupt made no mention of these pieces of property or either of them. Under these circumstances, the counsel for the appellants contends, that the failure to include these pieces of property in the formal statement avoided the composition, and the same should now be set aside.

First. Does a failure to include an asset in such statement, when there is no fraud, no want of knowledge on the part of the creditors, and the same is not of such value as would reasonably have required an alteration of the terms of the composition, render void the composition? The statute contains no statement to that effect. There was, evidently, no fraud in the case, and no concealment. The debtor stated fully all the facts, and they were perfectly understood by the creditors opposing, as well as by those assenting to, the com-

position. There is no reason to suppose, that if the facts, as the debtor stated them, had been set forth in the statement, it would have altered the judgment of the creditors as to the wisdom of the compromise. The Mississippi estate was owned by the debtor and his wife in community, under the laws of Louisiana. He had already received from the estate a much larger value than was left, and, in equity, and as against his wife, had no interest therein. The New Orleans property had been conveyed by him, many years before, to his wife, under the advice of counsel, had been held from that time under claim of that conveyance, the law in relation to it was differently stated by different counsel, and a severe, protracted, and expensive litigation was a certain preliminary to the recovery of any interest therein. In fact, the creditors understood and weighed the matter, holding that it was not worth the contest. This I assume from the fact already stated, that the debtor, in his testimony, developed the whole matter, and that, with the knowledge of it, the creditors recommended the composition.

The statute of the State of New York authorizes the discharge of an insolvent debtor from his debts, upon the petition of himself and his creditors, "upon the provisions of this article being complied with." (3 R. S., 5th ed., 91, 93.) The insolvent is to present a petition, signed by himself and two-thirds of his creditors. He is required to annex to his petition a schedule containing a full and true account of all his creditors, and the sum owing to each, etc. Many cases have arisen, where the discharge granted under this statute was attacked, because certain debtors, whose names and the amount of whose debts, there specified, were not set forth in the schedule annexed to the petition. The holding has been uniform, in the courts of New York, that such omission did not invalidate the discharge, unless the omission was intentional, and, therefore, fraudulent, or unless such debts so increased the sum total as to show that two-thirds in amount had not petitioned, and, hence, that there was a want of jurisdiction. (*Taylor* v. *Williams*, 20 Johns., 21; *In re* Hurst, 7

Wend., 239; *Ayres* v. *Scribner*, 17 Wend., 407; *Soule* v. *Chase*, 1 Abb. P. R., N. S., 48; *Stanton* v. *Ellis*, 2 Kern., 575.)

The principle is the same here. The debtor is required to present a statement of the whole of his assets and his debts. There is no specification in the statute, that the composition depends, for its validity, upon the presentation of such a statement, or that its accuracy is a condition of his discharge. A subsequent portion of the section contemplates that a statement may be inaccurate, through inadvertence or mistake. It says: "Any mistake made inadvertently, by a debtor, in the statement of his debts, may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors." The creditors act upon their own judgment, having before them a statement of debts and assets, and having the debtor present to "answer any inquiries made of him." If there is no fraud and no ignorance of facts by the creditors, I hold the composition to be valid, although there be, in the "statement," a defect as to debts or assets.

Second. If necessary, I should hold that the testimony of the debtor, under oath, taken down by the clerk, at the meeting of the creditors, constituted a part of his statement. The statute specifies no form, manner, or time at which this statement shall be made or presented. It is provided only, that he shall be present at the meeting, to answer inquiries, and that he, or some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts. If no previous statement had been prepared, but, upon attending the meeting, the debtor had been sworn by the clerk, and given testimony as to the whole of his debts and assets, which was written down by the clerk, and received and acted upon by the meeting of creditors, I should hold it to be a sufficient and valid statement, within the statute. Such statement gives to the creditors knowledge, for the purpose before them, and it is always open to examination, both for information and for punishment, if untrue, by being filed with the

clerk. The creditors acted upon it. In his opinion, the District Judge discusses it, and bases his approval upon it. The whole effect intended by the statute is produced, and as satisfactorily as if the information had been embraced in the formal statement.

Third. The omission was of a claim to property which the debtor honestly and intelligently, and under the advice of counsel, supposed was baseless. Some other person supposes he was in error. Is he to act upon his own judgment, and that of his counsel, or is he to consult upon the subject with every man that he meets? Assuming, as I do, perfect good faith and reasonable intelligence, I hold that a statement made under these circumstances was not invalid because it omitted a reference to the New Orleans and Mississippi property.

Upon the whole case, I am of the opinion, that the decree confirming the composition was right, and that the review asked for should be denied.

UNITED STATES CIRCUIT COURT.—N. D. NEW YORK.

The State of New York has a lien upon the machinery and tools of a contractor, for the services of convicts, which are used by him on the prison premises for operating the contract.

A contract for the services of convicts is valid, although the contractor does not make the deposit with the comptroller as required by law.

In re EDWARD BURT & THOMAS TOWNE.

Charles F. Durston and *John T. Pingree*, for the assignee.
William E. Hughitt, for the creditor.

HUNT, J.—The question whether the contract of August 1st, 1871, secures to the State a lien upon the machinery and tools of the bankrupts, is the only important question in the case. Burt & Towne were manufacturers of doors, blinds, sashes, and similar articles. They entered into a contract with the agent of the State Prison at Auburn, for the labor

and services of a certain number of convicts, whose services were to be used in a room of the prison, to be provided by the agent. Among other provisions, the contract contained the following, viz.: "10th. Any debt which may be due or become due from any contractor upon his contract, shall be a lien in favor of the State upon the machinery and tools used and owned by such contractor in operating such contract upon the prison premises. Such lien shall commence with the contract, and shall continue during the existence of the contract, and until the claim or debt shall be satisfied or canceled, and it shall be lawful for the agent and warden of the prison, under the direction of the inspectors, or a majority of them, whenever any sum shall be due from a contractor, to proceed to satisfy such lien by a sale of the property affected by such lien, in the same manner as by a sale upon a chattel mortgage." The contractors filed their petition, and, on the 15th of July, 1873, were adjudged bankrupts. At the time of filing their petition they were indebted to the agent for the labor and services of convicts under this contract, in the sum of five thousand one hundred and twenty-eight dollars and forty-seven cents. The agent seized the machinery and tools of the contractors, under the authority of Section 10, above cited, and advertised them for sale to satisfy this debt. The Register held that the claim of the agent was valid. Upon appeal to the District Court, this holding was affirmed, and the assignee in bankruptcy appeals from that decision to this court.

The statute of the State of New York (Laws of 1863, Ch. 465, p. 803, Section 1) enacts as follows: "In all contracts which may hereafter be let or awarded for convict labor at any prison, a clause shall be inserted, that any debt which may be or become due from any contractor upon such contract, shall be a lien in favor of the prison, upon the machinery and tools used or owned by such contractor in operating such contract upon the prison premises; and such lien shall thereupon commence with such contract, and shall continue during the existence of the contract, and until the claim or

debt shall be satisfied or canceled." The assignee, who is the appellant here, objects to the decision of the District Court, on the grounds: 1st, That the statute of 1863 does not, of itself, create a lien; that the alleged lien is not a chattel mortgage, as it does not, in words, transfer any title, and, if a mortgage, it is void for want of filing; and that it is not a pledge, as needing the essential element of delivery. 2d, That the contract is void for the reason that no deposit of money was made, as required by the Act of 1863.

First. In the case of ordinary contracts, the suggestions made under the first point would be entitled to grave consideration. A professed transfer of title, or a formal incumbrance upon the subject, is the ordinary and, perhaps, the necessary mode of creating a chattel mortgage. In the case of ordinary mortgages it is clear, also, that, as against creditors, a filing and a refiling of the mortgage is necessary. So, it is the general rule, that delivery is essential to the validity of a pledge; and the argument is, at least, a fair one, that the agent never had possession of this property. (*McCaffrey* v. *Wooden*, 62 Barb., 316.) The answer to the argument I conceive to be this—that the legislative power is competent to alter and modify the rules referred to. It may say what particular words shall be sufficient to create a chattel mortgage, or, that no words of transfer shall be required, or that in particular cases, no filing shall be necessary, or that delivery shall not be requisite to the validity of a pledge. The Legislature has full power to declare what shall constitute a lien, and, if no constitutional principle is violated, its declaration is conclusive.

In the 1st Section of the Act of 1863, the Legislature has declared, emphatically, that what was done in this case created a lien upon the tools and machinery in question, which should continue until the satisfaction of the debt. If there shall be inserted in a contract for convict labor a clause, that any debt which may become due from the contractor shall be a lien upon the tools and machinery used by such contractor in operating the contract, such lien shall thereupon

commence, and shall continue until the debt be paid. "Such lien shall thereupon commence," *i. e.*, the lien described, "in favor of the prison, upon the machinery and tools used in operating such contract." It shall commence "thereupon," or as soon as, or upon, the insertion of that clause in the contract. The lien then comes into existence, and continues until the debt is paid. It is a statutory lien, created by express statute, for the benefit of the State. Mechanics' liens are authorized by statute, and in various forms and under different circumstances. The lien of an execution, when it shall commence, when end, what shall or shall not release it, is the subject of statutory regulation. The same is true of the lien of a judgment. In this case, the lien exists because the statute gives it, and as the statute creates it. Nothing other or further than the existence of the requisites of the statute is necessary to bring the lien into existence, or to continue its existence until the debt is paid.

Second. Nor is there force in the objection, that the contract is void because no deposit was made by the contractor, when the contract was entered into. The statute provides, that a clause shall be inserted in the contract, requiring the contractor to deposit with the comptroller a sum of money not less than five hundred dollars, nor more than two thousand dollars, as the inspector may determine, "and no contract shall be valid until such deposit shall be made." This is a provision for the benefit of the State, and in which the contractor can claim no beneficial interest. He cannot insist upon the validity of a contract until he performs this requirement. But his neglect and failure cannot be claimed by himself for his own benefit. The State may say, "You have not performed what the law requires, and we annul the contract;" but the contractor is not thus at liberty to take advantage of his own neglect. There are numerous provisions of the statute containing similar language, as, that the conveyance shall be "absolutely void," or the contract shall be "utterly void;" but it has never been held that the party in a case, when he was in default, could urge his own default as

a ground of the invalidity of the contract, and in his own favor.

The order of the District Court, affirming the order of the Register, must be affirmed.

COURT OF APPEALS—KENTUCKY.

A State law to prevent fraudulent assignments is not an insolvent law, and is not superseded by the Bankrupt Law.

EBERSOLE & MCCARTY v. *ADAMS, etc.*

APPEAL from Fleming Circuit Court.

Cord, Teagar & Cole, for appellants, cited 4 Peters, 203; 3 B. Mon., 403.

E. C. Phister and *L. W. Andrews*, for appellees, cited Bankruptcy Act of Congress of 1867; Act of March 10, 1856; Story's Abr. Com. on Con., Sections 537, 538, 544; 2 Kent's Commentaries, p. 390; *Sturges* v. *Crowninshield*, 4 Wheat., 122; *Gibbons* v. *Ogden*, 6 Wheat., 448; *Houston* v. *Moore*, 5 Wheat., 1, 34, 54; *Everett* v. *Stone*, 3 Story, 446, 453; 2 Ired., 463; 3 B. Mon., 401; *Griswold* v. *Pratt*, 50 Mass., 16.

LINDSAY, J.—The petition in this action was framed under the provisions of the act approved March 10, 1856, entitled "An Act to prevent fraudulent assignments in trust for creditors, and other fraudulent conveyances." It is alleged that the conveyance from Adams and wife to Kirk was made and executed in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole or in part, of others; and under the general prayer for relief the court is authorized to declare that said conveyance operated as an assignment and transfer by Adams of all his property and effects for the benefit of all his creditors, to take possession of such property and effects, and make distribution among the creditors as directed by said act.

To the petition appellees demurred, upon the ground that

the Act of 1856 is "a State system of bankruptcy," * * * and that it was "superseded and in effect repealed by the Act of Congress of the United States, passed in pursuance of express constitutional power, entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved March 2, 1867.

The demurrer was sustained, a personal judgment rendered against the debtor, Adams, and the petition, to the extent that relief was asked against Kirk, under the provisions of the Act of 1856, dismissed."

This act is not a bankrupt law, nor an insolvent act. It has none of the characteristics of either, except that it provides for the appropriation of the property of the debtor to the payment *pro tanto* of all his creditors.

An assignment or transfer made in contemplation of insolvency, and to prefer creditors, is an act of bankruptcy under the Act of Congress; but this fact does not deprive creditors of the right to apply to State courts for relief, in case they choose to do so. Notwithstanding the Federal Bankrupt Act, the State courts have full and complete power to relieve against all frauds, actual or constructive, except in cases in which a Court of Bankruptcy has first taken jurisdiction, or where the relief asked in the State courts is subversive of the rights of parties to a pending proceeding in bankruptcy subsequently instituted.

If the Act of 1856 be regarded as a State Bankrupt Law, there is still no reason why the Circuit Court should not enforce it. State Legislatures have the power to pass Bankrupt or Insolvent Laws, providing there be no Act of Congress in force establishing a uniform system of bankruptcy, conflicting with such law. It was so held by Mr. Justice Johnson of the Supreme Court, in the case of *Ogden* v. *Saunders*, 12 Wheat., 213, 273. And in the subsequent case of *Boyle* v. *Zacharie*, 6 Pet., 348, Chief Justice Marshall stated that "the judges who were in the minority of the court, upon the general question as to the constitutionality of State insolvent laws, concurred in the opinion of Mr. Justice Johnson in the case of

Ogden v. *Saunders*," and hence, that that opinion was therefore to be considered as no longer leaving the question open for controversy.

The binding force of this decision was again recognized by the Supreme Court in the case of *Baldwin* v. *Hale*, 1 Wall., 223. Judge Cooley, after reviewing all the cases bearing upon this subject, states the settled law to be that "the several States have power to legislate on the subject of Bankrupt and Insolvent Laws, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy; which authority, when exercised, is permanent, and State enactments in conflict with those of Congress upon the subject must give way."

The State law under consideration does not conflict with the law of Congress. Except to the extent that the distribution by the State court of the assets of the debtor's estate relieves him from liability to his creditors, his obligation, and the right of the creditors still to look to him and to his future acquisitions for such amounts as may remain unpaid continue unimpaired.

All the creditors may make themselves parties to the proceeding in the State court, and the assets of the debtor are marshaled and distributed substantially in the same manner as the Act of Congress provides shall be done in a proceeding in bankruptcy.

The State law being in every essential consistent with the Act of Congress, there is no reason why the latter act shall be regarded as superseding or repealing the former.

The court below erred in sustaining the demurrer, and in dismissing appellant's petition.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceedings consistent with this opinion.

The appeal is dismissed as to Mrs. Adams, it not appearing that appellants have any claim against her, and no reason being shown for making her a party either to the proceedings in the Circuit Court, or to this appeal.

UNITED STATES DISTRICT COURT—N. D. OHIO.

A creditor who has in good faith joined in an involuntary petition cannot withdraw.
If a creditor was induced to join an involuntary petition by misrepresentation, he may be allowed to withdraw at any time before adjudication.
An affidavit to an involuntary petition may be amended.
A creditor who has joined in an involuntary petition cannot afterwards object to an amendment thereof, which is necessary to the prosecution of the same to final effect.
If an agent verifies a petition or deposition, he must show his authority.
Where a question is made as to whether a sufficient number of creditors have joined in an involuntary petition, the case may be referred to a Register or Commissioner to examine the proofs and report thereon.

In re EDWARD SARGENT.

WELKER, J.—Held: *First.* That where creditors in good faith join in petition in bankruptcy, they cannot afterwards withdraw so as to leave a less number and amount of the creditors than is required by law, and deprive the court of jurisdiction as to the matter of adjudication.

Second. That where assent to join in petition is obtained by misrepresentation or misunderstanding by the creditor, upon the same being shown to the court, such creditor will be allowed to withdraw at any time before adjudication.

Third. That the affidavit to the petition being defective in form, it may, on motion, be amended so as to conform to law.

Fourth. That a creditor who has in good faith joined in the petition, cannot afterwards object to amendments thereof which appear necessary to the prosecution of the same to final effect.

Fifth. That where an attorney verifies the petition, the affidavit thereto, or other proof, he must show his authority for making such verification.

Sixth. That where a question is made as to whether a sufficient number and amount of creditors have joined in the petition, it is proper and the better practice to refer to a Register or United States Commissioner to examine the proofs, and report whether the required number and amount have joined therein.

SUPREME COURT—ILLINOIS.

The lien of a judgment is not affected by the Bankrupt Law.
Where a lot of ground claimed as exempt under the laws of Illinois is worth more than one thousand dollars, a judgment is a lien on the excess.
If a prior mortgage is paid, a judgment may be enforced against the surplus over the exemption allowed by law.
An allotment of an exemption by the assignee does not impair the lien of a judgment.

JAMES W. HAWORTH v. *JAMES TRAVIS et al.*

APPEAL from the Circuit Court of Macon county, the Hon. Arthur J. Gallagher, Judge, presiding.

This was a bill in chancery, by James W. Haworth against James Travis, William Pitts, and Isaac Wilson, to enjoin the sale under execution of certain premises of the complainant, by Travis, sheriff, issued upon a judgment in favor of Pitts and Wilson, against the complainant, on the ground that the property was exempt as a homestead. The facts of the case are stated in the opinion of the court.

Messrs. Nelson & Roby, for the appellant.

Messrs. Crea & Ewing, for the appellees.

WALKER, J.—It appears that, on the 19th day of April, 1866, Pitts and Wilson recovered a judgment in the Circuit Court of Macon county, against appellant; that he was then the owner and in the actual possession of two lots in the city of Decatur, which he then, and ever since has, occupied as a homestead, being, during that time, the head of a family, and residing with the same; that he executed two mortgages on the premises, either before or subsequent to the recovery of the judgment, but which, does not clearly appear, to secure one thousand dollars; that in December, 1868, appellant filed his petition in the United States District Court to be declared a bankrupt and to be discharged from his debts, which was done by decree of that court in August, 1869; that the assignee in bankruptcy set apart to him the two lots, subject to the mortgages, as exempt from his debts under the Act of Congress. Subsequently, the mortgages were fore-

closed and the lots sold; the appellant redeemed from the sale after having received his discharge in bankruptcy. After he had so redeemed, he again mortgaged the lots to one Jack for about the sum of five hundred dollars; that afterwards, on the 10th day of August, 1870, Pitts and Wilson sued out an alias execution on their judgment, placed it in the hands of the sheriff, who thereupon summoned a jury, under the statute, who appraised the lots at two thousand dollars, and finding the property susceptible of division, set apart to appellant a portion thereof worth one thousand dollars, as his homestead, and the sheriff thereupon levied the execution on the remainder of the lots and advertised it for sale. Appellant thereupon filed a bill for an injunction to restrain the sale of the property. A temporary injunction was granted, but, on a hearing on bill and answer, the court below dissolved the injunction and dismissed the bill. Thereupon complainant appealed, and brings the record to this court, and assigns for error the dismissal of the bill.

The whole controversy in this case turns upon the question whether the judgment became a lien on these lots, or if not, upon the surplus over and above the value of the homestead.

The Bankrupt Act fully recognizes the lien of a judgment. The 14th Section of the act (Sess. Laws 1867, p. 160) declares "that the assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposits, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrances." This language is sufficient to embrace the lien of a judgment, and we must hold that such a lien is unaffected by the Bankrupt Act. Such being the case, we come to the consideration of the effect of what is known as our "homestead law." It exempts a lot of ground and the buildings, thereon, in value not exceeding one thousand dollars, where the same is owned and occupied by a debtor who is the head of a family, and resides with the same, from levy and forced

sale under any process or order from any court of law or equity, for debts contracted after the 4th of July, 1851. It has been held by this court that where the lot of ground, with its improvements, is not worth more than one thousand dollars, the lien of a judgment does not attach to the property unless it shall be abandoned as a homestead. And it has also been held that the debtor may sell and convey the same free from such lien. (*Green* v. *Marks*, 25 Ill., 221; *Bliss* v. *Clark*, 39 Ill., 590.) But the court has not decided that the judgment creates no lien on the residue over and above the one thousand dollars in value.

In the case of *Smith* v. *Miller* (31 Ill., 158), it was held that, whilst the mortgage did not affect the homestead right, yet, if the premises were worth more than one thousand dollars, it is binding, and upon a foreclosure the excess may be reached by a division; or, if that cannot be made, then by a sale in the mode prescribed by the statute; and the lien of the judgment operates precisely as that of a mortgage where the right is not released. It will be observed that the law only exempts the lot of ground and the buildings thereon to the value of one thousand dollars. The language employed cannot be extended to the whole tract, where it exceeds that value. It is only so much of the lot as is worth the sum that is exempted, and not the entire lot upon which the debtor resides. And the statute prescribes the manner in which the officer shall proceed to subject the excess over the amount exempted, to sale. When the entire statute is considered, we can give it no other construction than that it was intended to exempt the lot to the value of one thousand dollars, and to leave the remainder subject to lien and sale as any other real estate. This judgment, then, became a lien on these lots for all over the amount exempted, and that portion became subject to sale in the mode prescribed by the statute.

There seems to be some difference as to whether the judgment or the first mortgages were prior in date. We cannot see that this can, in any wise, affect the question. Appellant voluntarily discharged them and removed the incum-

brance of the mortgages. If the judgment was prior in date, then these mortgages would have been no obstruction to the sale of the excess beyond the homestead exemption. On the other hand, if the mortgages had precedence, when they were satisfied, all obstructions were removed to a sale of the surplus. The judgment, if junior, became a lien on the surplus, subject only to the mortgages, and when they were removed, a sale could be made free from incumbrance.

The allotment of this property to appellant by the assignee, in no wise impaired the lien of the judgment. It was set apart to him, and he took it subject to all liens and incumbrances, and when he removed them, and not till then, could he claim more than one thousand dollars worth of the property free from these liens. It would be unjust to permit a debtor, because he occupied property of the value of many thousand dollars, and it was incumbered to its full value, to claim it as exempt from sale under judgments against him simply because he occupied the property and discharged such incumbrances. He had no exemption of the money he used in paying the mortgages, and why should the premises thus released be exempt beyond the homestead? Nor would improvements placed upon the property, increasing it in value, be exempt beyond the one thousand dollar homestead; nor would the rise in value of the property, after the lien attached, or after an allotment had been made, exempt more than one thousand dollars in value, or prevent a new appraisement and allotment. (*Stubblefield* v. *Graves*, 50 Ill., 103.) The statute is not designed to exempt more than one thousand dollars in value of the homestead. To hold otherwise, would be a palpable violation of the plain meaning of the statute.

We perceive no ground for reversing the decree of the court below, and it must be affirmed.

Decree affirmed.

UNITED STATES DISTRICT COURT—E. D. VIRGINIA.

Where collateral securities are deposited for securing a particular note, with a banking company, by a stockholder who also owes it other notes, the collaterals consisting in chief part of shares in the company and in part of other securities; and the charter and by-laws of the company give a general lien upon the shares of its stockholders for all debts due by them; and the maker of the notes afterwards becomes a bankrupt:

Held, That the banking company has a general lien upon the shares of stock thus pledged, for the satisfaction of all the notes of the bankrupt due the company.

Held, also, that the remaining securities are bound for the other notes due, on the principle of equity; that the equities being equal between the company and the general creditors in bankruptcy, the possession of the securities by the company gives it preference.

Held, also, that a Bankruptcy Court must rule as a court of equity would do, upon such a pledge of collaterals, unless it can be proved that the pledging of them was made by the bankrupt under circumstances that would render the preference void under the 35th Section of the general Bankruptcy Act.

In re LEMUEL PEEBLES. Ex parte THOS. G. WATKINS, Assignee.

THE case was as follows:

On the 3d day of November, 1874, Lemuel Peebles, the bankrupt, made his negotiable note to the Petersburg Savings and Insurance Company, for eighteen hundred dollars, expressing in the body of the note that he "deposited one hundred and sixty-eight shares of the capital stock in the said company, twenty shares of the Atlantic, Mississippi, and Ohio Company, and a bond to him of J. H. Pool for nine hundred and sixteen dollars and fifty-two cents, on collateral security, with authority to sell the same at public or private sale, or otherwise, at the option of the directors of the said company, on the non-performance of *this* promise." On the 21st day of December, 1874, he filed his petition in bankruptcy; and was thereupon duly adjudicated a bankrupt. On the 7th day of January, 1875, Thomas G. Watkins was appointed his assignee. At the time of making the negotiable note mentioned, Peebles also owed a stock note to the company for eighteen hundred and forty-eight dollars; also a note of twelve hundred and fifty dollars, indorsed by

another person; also three notes amounting to ten hundred dollars, indorsed by three other persons; also a note of two thousand three hundred dollars and one of nine hundred dollars, indorsed by another person. The total value of the collaterals deposited with the eighteen hundred dollar note was four thousand two hundred and six dollars by estimate.

The *charter* of the Petersburg Savings and Insurance Company contains the following provisions:

"The said company shall have power to make and ordain such ordinances and regulations, and generally to do any act and thing necessary to carry into effect this act, or to promote the object and design of the corporation." * * * "Every stockholder not in debt to the company, may at pleasure, in person or by attorney, assign his stock on the books of the company, or any part, not being less than a whole share—but no stockholder indebted shall assign or make transfer of his stock or receive a dividend until such debt is paid, or secured to the satisfaction of the Board of Directors."

The *By-laws* of the company contain these provisions:

"In all cases of transfer of stock, all debts due or to become due to the company shall first be paid or satisfactorily secured." * * * "The interest of any stockholder of this company shall be liable for the payment of any and all debts which may be due from him at any time to the company, either as principal or indorser, and in case there shall be more than one debt, the Board of Directors shall have power to prescribe which one or more of such debts shall be paid out of the stock."

The assignee filed his petition, charging that the company intends to make sale of the collaterals it holds from Peebles, pay themselves the note of eighteen hundred dollars, secured by them, and apply the surplus to the liquidation of the remaining notes in which Peebles is indebted. The assignee complains that his rights will thereby be prejudiced; claiming that the surplus of the proceeds arising from the sale of the collaterals, after payment of the eighteen hundred

dollar note, belongs of right to him as a part of the assets of the estate, distributable *pro rata* among the general creditors of Peebles.

W. W. Crump and *Meade Haskins, Esq.*, appeared for the assignee, Thomas G. Watkins, who also took part in the argument.

Wood Bouldin, Jr., Esq., for the banking company.

HUGHES, J.—The question is, whether the banking company has a lien upon the collaterals for the satisfaction of the other notes of Peebles due to it, after the payment of the particular note (for eighteen hundred dollars) for which they were expressly pledged.

This question has been much litigated. The Roman law gave a lien upon the chattels pledged for one debt, for the satisfaction of all the debts held by the pledgee against the pledgor. But the rule of the common law of England, and of this country is different. Lord Mansfield, in *Green* v. *Farmer*, 4 Burr., 2214, 2221, stated the law of the subject in the following terms:

"The convenience of commerce, and natural justice, are on the side of liens; and therefore, of late years, courts lean that way, 1st, Where there is an express contract; 2d, where it is *implied* from the usage of trade; or 3d, from the manner of dealing between the parties in the particular case; 4th, where the defendant acts as a factor."

This is still the law; that is to say, there is no lien at common law which gives the holder of pledged personal property a lien upon it, beyond the especial object for which it was pledged; except in the cases mentioned by Lord Mansfield. Equity, indeed, often extends the lien beyond the special object, where the general principles governing in courts of equity allow it. But in courts of law, the rule is as laid down in fourth Burrows. This condition of the law of the subject has made it necessary to resort to statutory provisions wherever the lien is sought to be enforced; and it has become a practice to give by statute this lien in cases where it did not exist at common law.

The present case does not fall within any of the exceptions mentioned in *Green* v. *Farmer;* and if the banking company has a lien at all, upon the collaterals in its hands, beyond the note for eighteen hundred dollars, it has it only by virtue of its charter and by-laws. Do these give the lien which it claims? They certainly do in terms as to the one hundred and sixty-eight shares of the company's stock, and the only question is, will this court enforce the provisions of the charter and by-laws. The decisions in this country construing the charters and by-laws of corporations on this subject of liens, are conflicting; and if there were no particular precedents imperative upon this court, there might be room for doubt what the decision in the present case ought to be. But the Supreme Court of the United States has passed upon this question in *Bank of Georgetown* v. *Laird*, 2 Wheat., 390, and *Brent* v. *Bank of Washington*, 10 Pet., 596. It has decided that "the lien of a bank under its charter, on its shares, for a debt due from their owner, is superior in equity to a lien acquired from the owner by a third person, and is not waived simply by taking other security for the debt."

In the case at bar it was contended that the taking of the collaterals expressly as security for the eighteen hundred dollar note, and of indorsers as specific security on the other notes, was a virtual waiver of the lien which the banking company might otherwise have had on the collaterals for the security of the other notes. But the law is otherwise. Two points were decided in 2 Wheat., 390, where the case was essentially the same as the present one:

1st. That the provisions of the company's charter giving a general lien upon its shares are valid; and 2d, that taking other security for the debts due to the bank does not waive the lien given by the charter, on the stock of the bank itself.

Under that, as well as under the well settled general law, I must hold, that the charter and by-laws of the Petersburg Savings & Insurance Company did create a lien upon the shares of the company owned by Peebles, beyond the note

for which the collaterals deposited by Peebles were given, for the satisfaction of all the other notes due by Peebles to the bank. It is not necessary to decide, whether the by-law of this company is valid, which claims power for the directors of the company "to prescribe which one or more of several debts due the bank shall be paid out of the stock of the indebted member." As between the company and Peebles, himself, this power may be valid; but as between the bank and third persons interested in the apportionment, I incline to the opinion that the provision of the 15th By-law of the company is *ultra vires* and invalid. (See *Bullard* v. *National Eagle Bank*, 18 Wall., 589.)

If this were a suit at law, it is plain, that the provisions of the charter would be held to give a lien upon the one hundred and sixty-eight shares of the capital stock of the company for all the notes of Peebles; but that there was no lien on the other collaterals, for any other notes. If it were a suit in equity, the equities of the stockholders of the banking company on one hand, and of the other creditors of Peebles on the other, being equal, and the company having the legal title, the court would have to decree for the company, as to all the collaterals.

The only question is, whether the same principles obtain in a Court of Bankruptcy. I see nothing in this case to authorize and induce a different decision in bankruptcy from such as would have to be given if the case were before the court as a court of equity. It is not alleged or pretended that there were any circumstances attending the deposit of these collaterals with the company, by Peebles, which make it a case of preference under the 35th Section of the Bankrupt Law. There is no allegation or proof that there was any contemplation of bankruptcy by Peebles at the time; and knowledge of insolvency, and intention to defraud the act, on the part of the company. Unless such circumstances are alleged and proved, I do not see how this court, as a Court of Bankruptcy, can give any other decision than that which it would be bound to give, if the case were before it on its equity or common law side.

My opinion is, that the charter of the company and its by-laws give the company a lien upon the shares of stock which it holds for the payment, first, of the debt for which they were expressly pledged; and after that, of any and all other debts of Peebles to the company due or to become due, which it held at the time of the deposit. I am also of opinion that the equities of the company in the remaining collaterals being equal to those of the creditors of Peebles, and the company having the legal title and possession, these other collaterals should follow the same course. I will give an order accordingly.

COURT OF APPEALS—KENTUCKY.

The provisions of the Bankrupt Law for the dissolution of attachments apply to attachments sued out in State courts.

BANK OF COLUMBIA v. *OVERSTREET, etc.*

James Garnett, H. C. Baker and *T. T. Alexander*, for appellant, cited Civil Code, Sections 250, 287, 288; Constitution of Kentucky, Article IV., Section 1; Judiciary Act of Congress of 1789; Cooley's Constitutional Lim., 2d ed., pp. 11, 12, 18.

John S. Van Winkle, for appellees. (Brief not in record.)

LINDSAY, J.—The Bank of Columbia instituted its suit on the 28th of March, 1868, and on the same day sued out orders of attachment against the estate of the defendants, Overstreet and Hernford. The attachments were levied on certain real estate, the property of Overstreet, on the 1st day of April, 1868. The levy was made subject to the levies of several executions, and also subject to the levy of another attachment.

On the 21st of May, 1868, judgment *in personam* was rendered against Overstreet for the amount of the debt sued on

(seven hundred and thirty-four dollars and eighty cents), with interest and costs; and it was further ordered that the attachment "be sustained against the defendant;" but no order was made to sell the attached property.

Subsequently VanWinkle filed his petition, asking to be made a party to the action. He set up the fact that he purchased the attached realty at a sale made under the execution levies referred to in the sheriff's return, indorsed on appellant's order of attachment, and also that Overstreet, upon his own petition, had been adjudged a bankrupt in the United States District Court for the District of Kentucky, on the 14th of May, 1868, seven days before the order sustaining the attachment was made; that he had purchased from his (Overstreet's) assignee all such right and title to the attached property as passed to said assignee under the provisions of the Bankrupt Act. He claimed that the proceedings in bankruptcy discharged appellant's attachment, and prayed to have the litigation, so far as the appellant sought to subject the attached realty to the payment of its judgment, discontinued. Upon this statement of facts the petitioner was made a party defendant. He subsequently filed amended pleadings, stating that he had sold his interest in the property to Meadows, who had all the while been a party defendant to the action. Meadows amended his answer, first exhibiting the transfers from Van Winkle, and finally the sheriff's deed executed by virtue of the execution sale, and also the deed of the assignee in bankruptcy, conveying to him all right, title, and interest that came to and vested in said assignee by virtue of the proceedings in bankruptcy. He also exhibited the order of the Bankrupt Court discharging Overstreet from the payment of all debts existing at the time he filed his petition in said court. Upon hearing, appellant's petition was dismissed as to Van Winkle and Meadows, and from this judgment this appeal is prosecuted.

The proceedings in bankruptcy were commenced in less than four months after the levy of appellant's attachment.

Section 14 of the Bankrupt Act provides that the deed of assignment shall relate back to the commencement of the proceedings in bankruptcy; "and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." It is insisted by appellant that the provisions of this section do not apply to attachments sued out in State courts. This position cannot be maintained. The Federal Congress has the undoubted power to establish "uniform laws on the subject of bankruptcy throughout the United States." All laws of Congress, enacted pursuant to the powers delegated to it by the Federal Constitution, are binding as well upon the State as the Federal courts. It may be that the State courts are not bound to administer the Federal laws, but they are bound to respect all rights acquired under them. There is nothing in the Act of Congress from which it can be inferred that an exception was to be made in favor of creditors prosecuting their claims against a bankrupt in the State courts; and if the law had been so framed as that a proceeding in bankruptcy would dissolve attachments sued out in the Federal courts and leave unaffected those sued out in the State courts, it would not have been uniform in the constitutional sense of that term. Nor are we able to perceive that the dissolution of appellant's attachment in any sense impaired the obligation of a contract or divested it of a vested right. The attachment lien was secured by legal diligence and not by contract. The right to subject the attached property to the payment of its debt vested long after the Bankrupt Act had gone into effect. It was therefore a conditional right, subject to be defeated by the debtors being thrown into bankruptcy. In this case no peculiar hardship results to appellant. Its debt was contracted after the Bankrupt Act became a law. The credit was extended to Overstreet, with notice of the fact that the remedies afforded by the State

laws for the enforcement of the contract were liable to be interrupted or superseded by proceedings in bankruptcy which might be instituted by the debtor, or by one of his creditors, in case he should be guilty of an act of bankruptcy. It is unnecessary to determine as to the validity of the title acquired by Meadows through Van Winkle's assignment and the sheriff's and assignee's deeds. He was invested with the legal title to the attached property. He had such an interest in it as authorized him under the provisions of Section 257 of the Civil Code of Practice, at any time before it was sold and the proceeds paid out, to present his petition and claim the property, and in the prosecution of his claim he could dispute the validity of the attachment. He was clothed with the muniments of title, and was therefore entitled to have the property surrendered upon showing either that appellant's attachment was invalid from beginning, or that it had been dissolved after levy by operation of law. To establish the dissolution he had the right to rely upon proceedings instituted by Overstreet in the Court of Bankruptcy; first, because his title in part grew out of these proceedings; and second, because they operated to divest appellant of its attachment lien.

We perceive no error in the judgment of the Circuit Court.

It must therefore be affirmed.

COURT OF APPEALS—KENTUCKY.

A creditor cannot institute a proceeding to set aside a fraudulent conveyance after the commencement of the proceedings in bankruptcy.

A discharge bars the claim of a creditor, although it was fraudulently omitted from the schedule, and he received no notice of the pendency of the proceedings.

The notice required to give the court jurisdiction to grant a discharge is the notice prescribed to be given on the application therefor.

THURMOND v. *ANDREWS and WIFE.*

R. K. Williams, for appellant, cited Bump on Bankruptcy,

pp. 51, 395; Bankruptcy Act of Congress, Section 11; Revised Statutes, Chap. 24, Section 18; 1 Stanton, 281; Gazzam on Bankruptcy, pp. 255, 154; *Baldwin* v. *Hale*, 1 Wall., 223; The Mary, 9 Cranch, 126; *Boswell's Lessee* v. *Otis, etc.*, 9 How., 336, 350; 2 N. B. R., pp., 174, 144, 74, 81, 59; *Oakley* v. *Aspinwall*, 4 N. Y., 518; *Burnside* v. *Brigham*, 49 Mass., 79; *Payne & Bro.* v. *Able, etc.*, 4 N. B. R., 220; 7 Bush., 347; *Williams' Heirs* v. *Wilson*, 4 Dana, 507; *Hynes, etc.*, v. *Campbell*, 6 Mon., 286; *Ogden* v. *Saunders*, 12 Wheat., 213, 220; *Harris* v. *Hardeman, etc.*, 14 How., 334; 33 Bankrupt Register, p. 189.

Anderson & Neal, for appellees, cited Bankrupt Law of Congress, Sections 29, 34; 2 American Reports, 19; *Payne & Bro.* v. *Able, etc.*, 7 Bush., 346.

LINDSAY, J.—Johnson sued J. H. Thurmond on the notes executed for the payment of the purchase price of the Graves county land. For securing the payment of these notes a lien was reserved in the deed of September 7, 1865. This suit was compromised, and the notes of Thurmond satisfied by the conveyance to Johnson by Andrews and wife of certain land in Tennessee, the transfer of a claim for rents due on said land, and the individual undertaking of Andrews to pay to Johnson the sum of seven hundred dollars. Johnson did not require Thurmond in his contemplated conveyance to Andrews to reserve a lien to secure the payment of this seven hundred dollars, or any part of it. He therefore had no statutory lien on the land when Thurmond conveyed, at the request of Andrews, to the wife of the latter, and as he had parted with the legal title he could not assert a lien in equity. But T. G. Thurmond, who holds as the assignee of Johnson a note representing part of the seven hundred dollars agreed to be paid by Andrews, claims that the effect of the conveyance to the wife of Andrews was to give to her part of her husband's estate, and that under the statute (Section 2, Chap. 40, Revised Statutes) it is void as to said debt, and, therefore, may be relieved against by a court of

equity. If this be true, the right of action is in the assignee of Andrews, who has been adjudged a bankrupt by a court of competent jurisdiction.

Appellant concedes that under ordinary circumstances this would be the case; but he avers that the debt sued on was by Andrews fraudulently omitted from the schedule of debts reported to the Bankrupt Court, and that by reason of such fraudulent omission neither he nor his assignor had notice of the proceedings in bankruptcy, and hence had no opportunity to be heard, either as to the discharge granted therein, or as to the fraudulent disposition by the bankrupt of the land conveyed by Thurmond to his wife. He argues from these facts that the discharge granted by the Bankrupt Court does not apply to him, and in no wise affects his right to have a personal judgment against the bankrupt, and to be relieved against the alleged fraudulent and voluntary conveyance of the land.

Section 34 of the Bankrupt Act provides "that a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from *all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy*, and may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba* as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands; *and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of the discharge.*"

The debt sued on might have been proved in the bankrupt proceedings, and is therefore embraced by the language of the act.

The discharge is properly pleaded, and unless the language quoted is modified by some other section, or by some rule of law that we cannot presume Congress intended to disregard, the certificate must be regarded as conclusive not only of the fact that the discharge was granted, but that it was regularly obtained.

We cannot concur in the assumption that because appellant, or his assignor, was not regularly brought before the Bankrupt Court by publication and service of notice, as provided for in Section 11 of the Bankrupt Act, therefore, as to them and their debt, the said court had no jurisdiction. If this were true as matter of law, then in every case in which a creditor's name was omitted from the schedule of debts furnished by the bankrupt, and not afterward given to the marshal by the debtor, or some one else, the creditor might disregard the proceedings in bankruptcy, and enforce his demand in the State court. The bankrupt may innocently omit to report the name of a creditor, or he may not be willing to concede that he is legally bound to pay claims asserted against him. In such cases it is evident that he cannot be deprived of the right to rely on his discharge, no matter when or where he may be sued.

If the omission was intentional, or fraudulent, then the creditor may at any time within two years after the discharge is granted contest its validity.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

If a party intending to take the property of a corporation, and pay its debts, buys one of its notes indorsed by the bankrupt, this does not release the indorser.

A representation that a note has been paid does not operate as an estoppel, unless there has been some actual loss.

If the maker of a note agrees to wait a certain time for another party to purchase his property and pay his debts, without any promise on the part of the proposed purchaser, and a friend advances money to purchase the note, there is no such agreement for time as will release the indorser.

Ex-parte BALCH. In re ELLIOTT FELTING MILLS.

F. Y. BALCH, trustee, offered a proof against the assets of the Elliott Felting Mills, a bankrupt corporation, for the amount of three promissory notes of five thousand dollars each, signed by the City Mills, and indorsed by the bank-

rupt association. It was admitted that the City Mills were primarily liable, and that one of the notes had not been duly protested, and the proof upon that note was abandoned.

The questions upon the other two notes arose upon the following state of facts: "S. M. Weld had been treasurer of both corporations, and both stopped payment, and Weld and the Elliott Felting Mills went into bankruptcy; afterwards, the City Mills voted to sell all their property for the purpose of paying their debts, which were equal to just about the supposed value of the property; still later, viz., March 17, 1875, a vote of the stockholders was passed, recalling the order for a sale, and resolving to execute proper conveyances of all the property, which should be placed in the hands of Mr. Balch, as an escrow, to be delivered to Mr. Weld on his receiving his discharge in bankruptcy, within one year from the date of the vote, provided he should elect within one week after such discharge, to take the property, and should cause to be paid, or give a satisfactory guarantee against all the debts of the corporation, excepting one that was secured by mortgage. Weld was to run the mill in the meantime for cash, without subjecting the corporation to any liability, and if he ultimately bought the property, was to have any profits earned in the interim. About ten days after this vote was passed, a paper was drawn up reciting that certain friends of Mr. Weld had raised twenty-five thousand dollars to be lent him on his obtaining his discharge, and that it was desirable that the money should be applied at once to purchasing the debts of the City Mills, and agreeing that the money should be placed in the hands of Mr. Balch, to be applied to that purpose in such sums and at such times as Mr. Weld should direct; and that Weld should give his notes in exchange for the debts so purchased, and that Balch should hold the debts so purchased until Weld should obtain his discharge and give his notes for the several amounts. This agreement was signed by the several subscribers to the loan, including most of the stockholders and directors of the City Mills, with some others. Weld further agreed by the same paper

to devote his time to the superintendence of the business of the City Mills, with a view to purchasing the same under the vote above mentioned. Mr. Balch immediately bought these two notes, one of which was overdue and had been duly protested, and the other coming due on the day of his purchase, he caused to be protested. On or about the 16th of April, 1875, the property of the City Mills was seriously damaged by a flood, and the project for a purchase by Mr. Weld was abandoned, and this corporation went into bankruptcy.

At or near the time the notes were bought by Mr. Balch, Mr. Weld informed one of the assignees of the Felting Co. that they had been paid.

E. Merwin & W. P. Walley, for the assignees of the Elliott Felting Mills, contended:

First. That as against the indorsers this debt was paid by its purchase.

Second. The holder is estopped by the representation made by Mr. Weld, the real party interested, that the notes had been paid.

Third. Time was given to the City Mills, who were the principal debtors, and they, the sureties, were discharged.

R. M. Morse, Jr., for the creditor.

LOWELL, J.—Two of the three points are clearly against the objectors.

First. These notes have not been paid. All the papers and all the oral evidence clearly show that they were bought and were to be held good, at least against the City Mills. Now I admit that if a surety pays a note it may often be a payment and in his favor, and yet no payment as against him. In other words, the holder may still sue the maker upon the note, as trustee for the surety; or the surety may often sue the note himself. But if the note has been paid by the principal, it is gone. In this case there has been no payment by either principal or surety. The money did not come from either, and the purchase did not affect the surety in any way, unless his situation was afterwards changed by the act of

the purchaser, that is to say, unless the second or third point is good.

Second. There is no estoppel, because that depends on the actual loss of something in the particular case, and there is no evidence of such loss.

Third. The third point does not depend upon damage in the individual case. If time has been given to the principal the surety is discharged, whether there has been damage or not.

To constitute the giving of time there must be a valid contract, which a court would enforce in favor of the principal against the creditor. I think there is no such agreement in this case. By the vote the City Mills agreed to wait for one week after Mr. Weld should obtain his discharge, or for one year, whichever event should first come about, before disposing of their property excepting to him. He undertook nothing.

To the agreement between Mr. Weld and the subscribers to the loan, the City Mills were not a party; and there was no occasion for their becoming a party to it, for it does not bind the parties to it to do or forbear anything in respect to the City Mills. It is *res inter alios.* The clause on which the assignees more particularly rely is that which says that the debts of the City Mills shall be held by Mr. Balch for the benefit of the subscribers, until Mr. Weld obtains his discharge and gives his notes. This has nothing to do with suing or not suing the City Mills. It means, that Mr. Balch is to hold for the subscribers until he holds for Weld, and is intended merely for the security of the former. But granting that it intends that Balch should hold the very notes that he receives, still, if he should sue them, the City Mills would have no equity to prevent him. A breach of his trust, in this respect, would be nothing to them.

Besides, I have no doubt that the true construction of the vote of March 17th, is that Weld might at any moment after the vote was passed, whether before or after he obtained his discharge in bankruptcy, make up his mind, and notify the

corporation that he should not, under any circumstances, take the property. If this be so, there is nothing in the second paper to vary it. So that even if we grant that there was an implied agreement that Weld, buying the debts, should not sue them until he had determined not to buy the property; that merely amounts to an undertaking that he would not sue until he chose to sue, which, I apprehend, would be no answer or ground of action against him, because the very fact of his suing would conclusively prove and determine his election.

Debt admitted to proof.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A creditor who has never assented to a deed of trust, intended as a preference, and purporting to secure his claim, may disclaim all interest therein, and prove his claim as unsecured.

A trustee who accepts a deed of trust, given as a preference, and purporting to secure his claim, without any express qualification, assents to it as creditor, and cannot prove his claim without surrendering the preference.

A preferred creditor may surrender his preference at the first meeting of creditors and vote for an assignee.

A mere agent holding negotiable paper cannot under objection prove it when the owner is in a situation to make the proof himself.

A proof in due form makes out a *prima facie* case, subject to the discretion of the register and court to order further proof, and to the right of any creditor, or person interested, to offer counter-proof.

A creditor is not obliged, by the mere interposition of an objection, to produce such evidence as would be necessary at an ordinary trial.

In re W. A. SAUNDERS.

W. A. SAUNDERS having land standing in the name of his brother, and being deeply in debt, procured his brother to convey the land to A. E. Johonnot and R. E. Demmon in trust to pay certain of his promissory notes, which were specified in a schedule annexed to the deed. One creditor to a considerable amount held several notes, not specified in the schedule. The deed was recorded; and just before the end of two months from its date, Mr. Huntington, the creditor

above-mentioned, and certain others, filed a petition in bankruptcy against W. A. Saunders, relying, among other things, upon this deed as an act of bankruptcy; and bankruptcy was adjudged.

At the first meeting Huntington objected to the proof of the notes secured by the trust deed. Johonnot, one of the trustees, testified that only one of the holders of the notes had been asked to assent to it, and he had peremptorily refused, and that the deed was virtually abandoned. The several holders of the notes mentioned in the schedule gave evidence that they had never acceded to the deed in any way, and most of them had never heard of it. They all filed as part of their affidavits of debt, a disclaimer of any interest under the deed.

Three notes, held by Fairbank, Gill, and Fish respectively, were objected to on the ground that they were procured for the purpose of influencing the proceedings in bankruptcy. The evidence was that Huntington, fearing that he should not be able to procure one-fourth in number and one-third in amount of creditors to join in his petition for adjudication, had applied to these three persons, to whom he owed debts, and asked each of them to receive a note of Saunders as collateral security. This they all did; and immediately, at the request of Huntington, signed the petition for adjudication.

One of the notes offered for proof by a creditor was indorsed by the bankrupt, and objection was made at the hearing before the court that no evidence of its protest had been given.

G. W. Park, for Huntington.

M. Storey, for creditors under the indenture.

LOWELL, J.—The petitioning creditor, Mr. Huntington, was placed in a difficult position. He found on the records a trust deed, from which his notes appeared to be studiously omitted, and while he held debts sufficient in amount to enable him to make his debtor a bankrupt, and thus to avoid

this preference, he could not multiply himself to make up the number. The case illustrates the serious obstacles which Congress has lately interposed to shield a fraudulent debtor.

The courts, however, endeavoring to give the statute a reasonable construction, have held that creditors who have been preferred shall not count in estimating number or value, so that the petitioning creditor's arrangement to increase the number was, perhaps, unnecessary in this particular case. I have so held within a week past.

When the time comes to prove debts, it turns out that the secured creditors all disclaim their security, and deny that they had ever accepted it. Now, although our law presumes the assent of creditors in such a case in the absence of evidence, yet there can be no doubt that they may dissent, and it would never do to permit a debtor to close the door of the first meeting against some of his creditors by giving them security behind their backs, and holding them to a presumed consent, which they have never given. The opposing creditor suspects that these gentlemen might have taken up a different position if the two months had run out before a petition was filed. But I must decide by the sworn evidence, which gives no countenance to such suspicions. Upon the evidence, these debts are neither secured nor preferred.

The case of Johonnot himself is different. He was at once a creditor and a trustee, and by receiving delivery of the deed as trustee without any expressed qualification, he assented to it as creditor. He swears not only that the deed was never acted on, but that it was abandoned before the petition was filed. Under these circumstances, I think he should be permitted to prove, even at the first meeting, upon making and delivering to the Register for the use of the assignee, when appointed, a deed of the lands included in the conveyance, duly executed by all the trustees, and sufficient in all respects to pass the title.

I have before decided, for reasons satisfactory to my own

mind, that security may in many cases be renounced and surrendered by a creditor at the first meeting. I am aware that there have been decisions to the contrary, founded upon the words of the statute, which says a surrender may be made to the assignee. But since a creditor by proving his debt, *ipso facto* surrenders his security, and since a vote at the first meeting is often of much more importance than a piece of worthless security, I am not prepared to admit that a creditor who wishes to exercise this right is precluded by the permissive language of the statute, authorizing him to release to an assignee what he conclusively abandons by the mere proof of his debt. To guard against misapprehension I have always required that a positive surrender or release, or whatever else the case might require, should be made.

The second question is, whether the three notes held by Messrs. Fairbank, Fish, and Gill can be voted on separately in the choice of an assignee. Notwithstanding the form that was gone through of handing these notes to their present holders as collateral security, I think the fair result of all the evidence is that they are merely agents of Mr. Huntington; and while it is true, as a general proposition, that one who could sue a debt in his own name may prove it in his own name, yet I am of opinion that a mere agent, holding negotiable paper, cannot prove it, under objection, excepting in the name and for the benefit of the real owner, and, therefore, not at all when the owner is in a situation to make the proof himself. (See *ex-parte* Dreyfus, 13 N. B. R., 43.)

On the third point, I am of opinion that the holder of a note overdue making due affidavit as required by the statute, makes out his *prima facie* case, subject to the discretion of the Register and court to order further proof, and to the right of any creditor, or person interested, to offer counter-proof. In a great many cases, perhaps in a majority, the creditor has no personal knowledge of the facts, and his affidavit would not be of the slightest value in any court of justice, upon any issue involving those facts. But I should be

sorry to raise any doubt on the question, and I never heard any suggested, that a creditor is to be prepared, or obliged by the mere interposition of an objection, to produce such evidence as would be necessary at any ordinary trial, of these facts. It is not too much to say that the Bankrupt Law would break down under the strain that such a necessity would put upon creditors. It has always been the practice in all bankrupt cases to accept the affidavit as sufficient primary proof.

Order will be drawn in conformity with this opinion.

UNITED STATES DISTRICT COURT—MINNESOTA.

If a creditor holding a note against a firm, proves it against the estate of two of the partners who took the assets and agreed to pay the firm debt, he may prove for the balance against the estate of the other partner, and share *pro rata* with his creditors.

The rule in regard to the distribution of the assets of a firm, does not apply where one partner alone is bankrupt.

In re R. S. PEASE.

A STIPULATION containing a statement of facts has been filed, from which it appears, that "Three parties named Pease, Sherman, and Hall were partners in Minneapolis under that firm name, carrying on the business of dealing in paints, oils, and glass. As such copartners they contracted a debt to D. F. Freeman & Co., and gave a firm note for the amount, signed Pease, Sherman & Hall.

"Afterwards the partnership was dissolved, Pease retiring. Sherman and Hall continued doing business under that firm name, and agreed with Pease to pay all outstanding debts of Pease, Sherman & Hall. This agreement, however, was unknown to Freeman & Co., and they never released Pease.

"Afterwards Pease started in business at Minneapolis on

his own account, in the same line as the firm of which he had been a member.

"Afterwards the firm of Sherman & Hall was forced into bankruptcy, and Freeman & Co. proved against their estate the debt evidenced by the note of Pease, Sherman & Hall, and realized from the assets of said Sherman & Hall about twenty cents on the dollar of said debt, and no more, eighty per cent. of said debt being still unpaid.

"Afterwards Pease goes into bankruptcy individually, and said Freeman & Co. ask to prove against his estate the said eighty per cent. of their debt against Pease, Sherman & Hall, which remains unpaid after exhausting the estate of Sherman & Hall.

"It is admitted that at the time Pease retired from the firm of Pease, Sherman & Hall, he took nothing of the assets, and sold out his interest in the firm at that time for one dollar."

Charles D. Kerr, for creditors.

S. R. Thayer, for assignee.

NELSON, J.—It seems to me the equities are with the creditors of the old firm of Pease, Sherman & Hall.

The dissolution of the firm, the subsequent bankruptcy of Sherman & Hall, who continued the business after Pease retired, and finally the bankruptcy of Pease, do not change the liability of the respective members of the old firm of Pease, Sherman & Hall to their creditors.

The right of these creditors to pursue Pease after they had received a portion of their indebtedness from the estate of Sherman & Hall must be admitted. There is no pretense that they released him from his liability, though the assumption of the debts of the old firm by Sherman & Hall placed them under an additional and personal liability for all the debts of Pease, Sherman & Hall, which could have been recovered of them by the creditors, had they been solvent.

Now, how does this case stand? Sherman & Hall, who

took all of the assets of the old firm, have been declared bankrupts, and their estate has paid the creditors of that firm twenty per cent. There is a dissolution of the old firm, and all of the assets are disposed of, and Pease, who retired, is individually bankrupt. We thus have a firm dissolved, no assets, and all the partners insolvent and in bankruptcy, without any voluntary or *in invitum* proceedings being instituted to declare them bankrupt as a firm. Under such circumstances, in my opinion, the individual creditors of Pease have no prior rights to the creditors of the old firm of which he was a member. Their claims have been duly proved, and they are entitled to share *pro rata* with the other creditors. The equity rule in regard to the rights of firm and individual creditors does not apply, for the reason that no proceedings have been instituted against the partnership under Section 5121 of the Revised Statutes.

The creditors of the old firm can therefore share *pro rata* with the individual creditors of Pease to the extent of the unpaid portion of their claims.

UNITED STATES DISTRICT COURT—N. D. OHIO.

The bankrupt is entitled to an exemption although his wife owns a house. A partner cannot have an exemption set off to him out of the joint estate.

In re D. H. TONNE.

WELKER, J.—Held: *First.* That where the wife of the bankrupt is the owner of a house, not occupied as a homestead by the family, nor allowed to be so occupied by the wife, such bankrupt is entitled to exemption of property to the value of five hundred dollars, notwithstanding such ownership by the wife.

Second. That a partner in a firm in involuntary bankruptcy, is not, under the Ohio exemption laws, nor the Bankrupt Law, entitled to have set off to him out of the joint

property of the firm, property to the value of five hundred dollars.

Third. That such partner is only entitled to such exemption out of his individual property, if such he may have.

UNITED STATES SUPREME COURT.

If a stockholder at the time of subscribing for stock pays only a part of the regular price, a representation that there is no personal liability for the balance is immaterial.

The words "non-assessable" on the face of a certificate do not release the holder from liability for the balance that remains due and unpaid thereon.

If the charter and by-laws were placed in the hands of a party before he subscribed to stock, he is bound thereby, although he did not read them.

A misrepresentation as to the legal effect of a charter which was at the time in the hands of the subscriber, will not release him from liability on his subscription.

Where there is no contradictory evidence on a point, it should be ruled as a question of law.

If the defense is based on an alleged fraud, an instruction on that point should not introduce facts pertaining to another fraud.

A party who claims to have been drawn into a purchase by fraud, must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud.

C. W. UPTON, Assignee of the GREAT WESTERN INSURANCE COMPANY, v. *J. D. TRIBILCOCK.*

In error to the Circuit Court of the United States for the District of Iowa.

Hunt, J.—Two points are presented in this case. Upon the first point, the facts are as follows:

The plaintiff, as assignee of the Great Western Insurance Company, a bankrupt corporation organized under the statute of the State of Illinois, brought his action against the defendant, alleging that he was a stockholder of said corporation to the amount of ten thousand dollars; that twenty per cent. only had been paid upon his stock; alleging also the bankruptcy of the company, the appointment of the plaintiff

as assignee, and the demand of the amount claimed, and seeking to recover the eight thousand dollars remaining unpaid. The complaint averred that the defendant did verbally agree to become such stockholder, and with intent to become such did accept a certificate for the same, whereby he became bound to pay the full amount thereof, as follows: five per cent. upon delivery of the certificates; five per cent. in three months; five per cent in six months; five per cent. in nine months, and the residue whenever called for by the company, according to the charter of the company and the laws of the State of Illinois.

The defense is that the subscription was obtained by the fraudulent representations of the agent of the company to the effect that the defendant would only be responsible for twenty per cent. of the subscription made by him; that afterwards, he executed his promissory note for the twenty per cent. and secured the same by a mortgage of real estate, "and that, thereupon (in the language of the answer), and pursuant to agreement, said subscription contract was surrendered and delivered up to defendant;" and also, in the language of the answer, "that said note was a full payment and discharge of all obligations and personal liabilities of all kinds whatsoever by reason of his contract so made and the relations created by the delivery to him of said certificate, and said note was received in full payment."

In his third amended answer the defendant avers that he did subscribe for stock on the conditions mentioned; that after that contract was made, and before a certificate was delivered to him, and before executing his note, an agreement was made with Overton, on behalf of the company, to the effect before stated, and, thereupon, he made and delivered the note and mortgage, which was received by Overton in full discharge and payment of the amount due on his said subscription.

The evidence contained in the bill of exceptions leaves the case substantially as is averred in the pleadings. The defendant offered evidence tending to prove representations

that twenty per cent. only was required to be paid; that eighty per cent. was non-assessable, and created no personal liability; that the agent, Overton, exhibited a blank form of certificate, with the words "non-assessable" printed across the face, "being a copy similar to that subsequently filled up and delivered to defendant by Overton." It appears that before the defendant made his subscription a copy of the charter and by-laws had been furnished to him by Overton and that in returns made by the company to the auditor of the State of Illinois of the amount of "unpaid subscribed capital for which the subscribers were liable," the amount of the defendant's note was included.

The case standing in this position upon the pleadings and the evidence, the plaintiff requested the court to charge the jury as follows:

Second. That any contract between the company, or its agents, and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors in this action.

Third. That if the jury find from the evidence that defendant, J. D. Tribilcock, became a stockholder of the Great Western Insurance Company, in the month of August, 1870, and that he continued to own and hold said stock until after the insolvency of the company in February, 1873, that any representations by any agent of the company at the time defendant became such stockholder, as to the matter of his liability for eighty per cent. of the stock, or any indorsement on the stock of the words "non-assessable," are wholly immaterial, and constitute no defense to this action.

This request was refused.

It is hardly necessary to argue the proposition that if the defendant became a holder of shares of the capital of this insurance company, to the amount of ten thousand dollars, and had paid but twenty per cent. thereof, its creditors were entitled to require of him the payment of the eighty per cent. remaining unpaid. The acceptance and holding of a

certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder. (*Brigham* v. *Mead*, 92 Mass. R., 245; *Buff. City R. R. Co.* v. *Dudley*, 14 N. Y., 336; *Seymour* v. *Sturges*, 26 N. Y., 134.) The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a foot-ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received. (*Sawyer* v. *Hoag*, 9 N. B. R., 145; 17 Wall., 610; *Tuckerman* v. *Brown*, 33 N. Y., 297; *Ogilvie* v. *Knox Ins. Co.*, 22 How., 380; *Osgood* v. *Laytin*, 3 Keys, 521; 37 How. P., 63, affg. 48 Barb., 463; Gros Ill. Stat., 356, Section 16.)

We are of the opinion that the alleged representation of the non-assessability of the stock held by him was quite immaterial. It was so held in *Ogilvie* v. *Knox Ins. Co.*, 22 How., 380.

Again, if full effect is given to the evidence of the defendant, and to his claim in this respect, it shows this and nothing more: He became a stockholder under a certificate signed by the president and secretary, that he was entitled to one hundred shares of the stock of one hundred dollars each, payable, five per cent. on receipt of the certificate; five

per cent. in three months; five per cent. in six months; five per cent. in nine months from date; the time or manner of the payment of the residue not being specified. Upon the face of this certificate was stamped in red ink the figures $100, and in another place were stamped the words "non-assessable." This certificate he held until the insolvency of the company in 1873 was known to him.

The legal effect of this instrument was to make the remaining eighty per cent. payable upon the demand of the company. We see no qualification of this result in the words "non-assessable," assuming them to be incorporated into, and to form a part of the contract. It is quite extravagant to allege that these words operate as a waiver of the obligation created by the acceptance and holding of a certificate to pay the amount due upon his shares. A promise to take shares of stock imports a promise to pay for them. (*Palmer* v. *Lawrence*, 3 Sandf., 161; *Brigham* v. *Mead*, 92 Mass., 245.) An acceptance and holding of a certificate has the same effect. At the most, the legal effect of the words in question is a stipulation against liability to further taxation or assessment after the holder shall have fulfilled his contract to pay the one hundred per cent. in the manner and at the times indicated. We cannot give to them the consequence of destroying the legal effect of the certificate.

Still, again, the representations relied upon as a defense, it will be noticed, were as to the legal effect of the defendant's subscription and certificate. It is alleged that the agent represented that by the laws of the State of Illinois, and by the charter of this company, the defendant might become a subscriber to the amount of ten thousand dollars, and by means of a certificate to be given to him like that exhibited, he would really be liable only to the extent of one-fifth of his said subscription, and that good lawyers had given their advice to this effect.

There was here no error, mistake, or misrepresentation of any fact. The defendant made the subscription he intended to make, and received the certificate he had stipu-

lated for, and as there is no evidence to the contrary, it is to be presumed the good lawyers advised as was stated; but in law, the defendant incurred a larger liability than he anticipated. (*Leavitt* v. *Palmer*, 3 N. Y., 19.)

He had received, several days before this time, a copy of the charter and by-laws of the company, and then had them in his possession. The 25th Section of the by-laws was as follows: "Every person who shall subscribe for ten thousand dollars of stock, and pay twenty per cent. thereof, shall be constituted a director of this company, and shall continue such director so long as he shall retain of such stock an amount equal to ten thousand dollars; but such ten thousand dollars shall not be reckoned in the election of other directors."

It was under this section, and the succeeding one, authorizing the establishment of a branch in any place where such subscription was made, and by which the defendant became a director, and might be president thereof, that the transaction took place.

That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract, and if he will not read what he signs, he alone is responsible for his omission. (*Jackson* v. *Croy*, 12 John., 427; *Lies* v. *Stub*, 6 Watts, 48; *Farly* v. *Bryant*, 32 Me., 474; *Coffing* v. *Taylor*, 16 Ill., 457; *Slapylton* v. *Scott*, 13 Ves., 425, 427; *Alvanly* v. *Kinnaid*, 2 Mac & G., 7; 29 Beavan, 490.)

That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled.

In *Fish* v. *Clelland* (33 Ill., 238, 243), the principle is expressed in these words: "A representation of what the law

will or will not permit to be done, is one on which the party to whom it is made has no right to rely, and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." (See *Star* v. *Bennett*, 5 Hill, 303; *Lewis* v. *Jones*, 4 B. & C., 506; *Rashdall* v. *Ford*, L. R., 2 Eq., 750.)

The law is presumed to be equally within the knowledge of all parties.

That a stockholder may relieve himself from his liability by proof that he was misinformed as to the effect of his contract when he made it, would be a disastrous doctrine.

That a defendant who could not by contract lawfully relieve himself from liability as a stockholder, can accomplish that result by proof that it was fraudulently represented to him that he could so relieve himself, would be strange indeed. (*Ogilvie* v. *Knox Ins. Co.*, 22 How., 380.)

The rule that a mistake of law does not avail, prevails in equity as well as at common law. (*Bank of U. S.* v. *Daniel*, 12 Pet., 32; *Hunt* v. *Rousmaniere*, 1 Pet., 1; 8 Wheat., 174; *Mellish* v. *Robertson*, 25 Vt., 603; *Leavitt* v. *Palmer*, 3 N. Y., 19.)

"If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible, for in almost every case ignorance of law would be alleged, and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and interminable." (Austin's Jour., Vol. II., 172; Kerr, 397.)

A statement that the insurance company had consulted with good lawyers, and that their opinion was as stated, should have been clear proof to the defendant that a representation of the law was a matter of opinion only.

We think the judge erred in not charging as was requested.

The facts upon which the second point arises are these: Assuming that fraudulent representations had been made to the defendant respecting his non-liability for the eighty per cent., and that they were of a character that might relieve him from his contract, it was objected that he had not used proper diligence in discovering the fraud, and in repudiating his contract. The transaction took place in August, 1870, and the defendant himself gave evidence "that he never suspected any liability as to said eighty per cent., or that the said representation as to the laws of Illinois were false, until the agent of the assignee made a demand upon him for the eighty per cent. in the year 1873, and that as no claim had been made upon him, he never made any investigation as to the truth of such representations until after said demand in 1873." In February, 1871, the defendant did ask for a rescission of his contract on the untenable ground that it had been fraudulently represented to him that his note should be retained and held in Bloomfield, Iowa, which representation had been violated by a sale of the same and a removal thereof to the city of Chicago. The defendant is explicit and emphatic in his evidence that this attempted repudiation "was based wholly on what was represented" as to the intended disposition of the notes and mortgage.

The plaintiff thereupon requested the court to charge the jury as follows:

Seventh. "That if he, defendant, offered to surrender his stock to the officers of the company, but not upon the ground that he had been induced to subscribe for the stock upon a fraudulent representation as to his liability for the eighty per cent., but upon another ground, to wit: that the company had sold and assigned his note and mortgage, then the evidence of such offer is immaterial, and the evidence of fraud as to such misrepresentations as to his liability for the eighty per cent. cannot be made available in this suit, and constitute no defense in this action."

Twelve. "That if defendant was induced in August, 1870, to become a stockholder of the Great Western Insurance Company, by a representation of the agent of the company that eighty per cent of the stock was non-assessable, and that the laws of the State of Illinois allowed the company to make such contract with those who took stock, then it was the duty of the defendant to use reasonable diligence to ascertain the truth of such representations, and to ascertain what the law of Illinois was on that subject; that if he did not do so within a reasonable time, and did not ascertain the truth of said matter until after the insolvency of the company in 1873, then he cannot, as to the creditors of the company, maintain any defense by means of such representations. The court instructs you, as matter of law, that the defendant could have ascertained the truth of such representations within a few months from the time they were made, and that not doing so is negligence on the part of the defendant that bars such defense as to the assignee."

The defense arising from the alleged promissory representations that the note and mortgage of the defendant should not be removed from Bloomfield, but should be retained in charge of the branch of the company at that place, was frivolous, and was practically abandoned on the trial. The case was submitted to the jury solely on the question arising upon the representations of the non-assessability of the eighty per cent. The attempted rescission on account of the representation as to non-removal and its violation was, however, unfortunately introduced into the charge in a manner that prejudiced the right of the plaintiff.

The requests, as above stated, were declined, but the judge charged the jury as follows: That "as respects creditors, the law requires of one who has been drawn by fraud into the purchase of stock, that he shall be guilty of no negligence or want of reasonable care in discovering the fraud, and on discovering it promptly repudiating the purchase. If you find from the evidence that within a few months after receiving the stock certificate the defendant, discovering that

he had been deceived in *some respects*, procured the agent who had obtained his certificate to go to Chicago, delivering to such agent his stock certificate, and instructed the agent to surrender up the stock and demand back the note for twenty per cent.; and if the agent accordingly went to Chicago and offered to the company to surrender the stock and rescind the contract, which the company refused; and if you find that the defendant never afterwards acquiesced in being a member of the company; that in September, 1871, he brought an action of replevin for the note, based on the ground of fraud; and if afterwards he refused to receive any dividend; and if all this took place before bankruptcy or insolvency of the company, I instruct that in point of law this is a sufficient repudiation of the contract to become a stockholder to enable defendant, living in another State, to resist an action for the payment of the eighty per cent., provided you find that defendant was induced to become a stockholder by fraud, as before explained; and also further find, in view of all the circumstances, that defendant was not unreasonably negligent in discovering the fraud, and was guilty of no want of reasonable diligence in taking steps to repudiate the transaction."

To this charge the plaintiff excepted.

The general principles set forth in this charge are no doubt sound. If the alleged promissory representation as to the non-removal of the note had been available, and had been the question submitted to the jury, the charge would have been well enough. But that question was not before them. The questions submitted to them related exclusively to the representation that the eighty per cent. should not be required to be paid. That was the fraud before the jury, and the question involved in the seventh and twelfth requests was this: Assuming that representation to be a fraud which would avoid the contract, had the defendant discharged his duty in discovering that fraud and repudiating the contract on account of that fraud, and not on account of another fraud not now in question. We think the defendant was en-

titled to the opinion of the jury on that precise question. The charge refused him this right. The jury were charged that if within a few months after receiving the certificate, the defendant, discovering that he had been deceived in some respects, sent an agent to Chicago to surrender his certificate and demand his note, if he never afterwards acquiesced in being a member of the company, if he brought an action of replevin for the note, and if he refused to receive a dividend, this was sufficient evidence of repudiation. This was well enough as to the abandoned fraud which was not before the jury, but was entirely inapplicable to the fraud that was before them. As to that fraud, the defendant testified that he had no knowledge or suspicion of its existence until after the demand made upon him in 1873, by the assignee, and that he never made any investigation as to the truth of the representation as to the eighty per cent. liability until after said demand, in 1873. On this point there was no contradictory evidence. It should have been ruled as a question of law. (*Pettibone* v. *Stevens*, 15 Conn., 19; *Beers* v. *Bottsford*, 13 *Ib.*, 146.) The submission should have been made, if not ruled as a question of law, on these facts only, as requested; and the failure to do so, and the introduction of the facts tending to show a repudiation on the ground of another fraud, could not fail to confuse the jury, and was error on the part of the judge.

Wright's case (L. R., 12 Eq., 331–351) is an authority on this point. It was there held, 1st, that under the English act, a surrender and cancellation of shares did not relieve the holder from his liability to creditors of the bank; and 2d, that a surrender by Wright of his shares in November, on the ground of an apprehended difficulty in the affairs of the bank, did not enable him to claim a rescission of his subscription on account of a fraudulent representation in the prospectus of the company, which fraud was then unknown to him. (*Henderson* v. *Royal British Bank*, 7 El. & Bl., 356; *Powis* v. *Harding*, 1 C. B., N. S., 533; *Oakes* v. *Turquand*, L. R., 2 E. & I., Ap. Cas., 325.)

The principle laid down in the charge of the judge, that one who claims to have been drawn into a fraudulent purchase must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud, is a sound one. (*Thomas* v. *Bartow*, 48 N. Y., 193.)

The defendant sought to become a member of a corporation of the State of Illinois, and to obtain the benefits and advantages of its special privileges. If he is not held to be bound to know and accept all the consequences of this connection, he certainly is bound to use care and attention to ascertain his position and promptly to make his choice of retaining it, with its advantages and responsibilities, or of abandoning it. To subscribe for stock in a corporation in August, 1870, to rest quietly until the year 1873, never making any investigation as to the position in which he stood until that time, and until after the assignee in bankruptcy had made a demand upon him, falls very far short of what the law requires. Especially is this the case when it is shown that he lived in an adjoining State, that he had sent an agent to Chicago, and himself went to that city in 1871 to obtain his note and mortgage from that very company for an alleged misconduct in another respect. It was his plain duty to have inquired and to have ascertained his position long before he did. "A party must use reasonable diligence to ascertain the facts." (*Buford* v. *Brown*, 6 B. Mon., 553.)

Mere lapse of time, where a party has not asserted his claim with reasonable diligence, is a bar to relief. Relief is not given to those who sleep on their rights. (*Beckford* v. *Wade*, 17 Ves., 87–97; *Jones* v. *Turberville*, 2 Ves., Jr., 11.)

Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person. (*Duke of Beaufort* v. *Neeld*, 2 Cl. & F., 248–286.)

Parties who are shareholders and claim to be relieved on the ground of fraud, must act with the utmost diligence and

promptitude. (Smith's Case, L. R., 2 Ch. Ap., 604, 613; *Denton* v. *Macneil*, L. R., 2 Eq., 352; Peel's case, L. R., 2 Ch. Ap. 674, 684.)

The judgment must be reversed and a new trial had.

MILLER, J.—I am of opinion that where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid installments, when suit is brought by the corporation; and that if the stockholder has in reasonable time repudiated the contract and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation.

I also think there was evidence of such fraud in this case, and that the question of reasonable diligence in the offer to rescind was fairly put to the jury by the Circuit Court.

I am authorized to say that the Chief Justice and Mr. Justice Bradley concur in what I have here said.

UNITED STATES DISTRICT COURT—KENTUCKY.

A Bankrupt Law which is not uniform is void.

No law can be uniform which prescribes rules for one State different from those prescribed for another.

Congress in adopting the exemption laws of a State as part of the Bankrupt Law, cannot dispense with any of the limitations imposed by that law.

Under the laws of Kentucky an exemption of land cannot be allowed as against debts contracted before its acquisition.

The right of exemption must exist, if at all, at the date of the commencement of proceedings in bankruptcy.

Under the laws of Kentucky, a bankrupt is not entitled to an exemption of an undivided interest in land on which there are no improvements, appurtenances, or dwelling houses, although he has expressed an intention to make it a homestead.

In re GEORGE T. DUERSON.

THOMAS DUERSON, a citizen of Todd county, Kentucky, died intestate November 26, 1873, leaving certain real and personal property which descended to his seven adult children and heirs-at-law, of whom George T. Duerson, the bankrupt, was one. On the 27th day of December, 1873, the heirs-

at-law met upon the premises in Todd county, and agreed upon a parol division of the real estate among themselves. No deeds of partition were made; a mere verbal agreement was entered into, whereby each of the parties in interest was to receive certain particular portions of the three hundred and four acres of land which had constituted the farm of their deceased ancestor. On the 27th day of January, 1874, this inchoate division was formally confirmed and perfected by the execution of proper deeds of partition by and to all the parties concerned, and by these conveyances eighty-eight acres of unimproved land were allotted to the bankrupt and his feeble-minded brother, Isaac Duerson, for whom the bankrupt was then and is now acting as a *quasi* committee. The conveyance was to them jointly, but it was verbally understood at the time that the western moiety of the land was the special property of the bankrupt, while the eastern half should belong to Isaac. The deed under which these parties held contained no such stipulation, the grant being to the two jointly, without any limitations as to the terms of any future settlement between the bankrupt and his brother.

At the time of the ancestor's death—November 27, 1873—the bankrupt was a *bona fide* housekeeper, with a family, near Whippoorwill, in Logan county, Kentucky. On the 12th day of January, 1874, he proceeded to Todd county, rented a dwelling within reach of his newly acquired possession, and began to make rails with which to inclose the land. Pending these operations, his family remained in Logan county, and did not remove to the rented place, in the vicinity of the land, until March, 1874. It is in evidence that the bankrupt stated and declared at the time of the parol division of the land—December 27, 1873—that he intended to improve and occupy his quota of the land as a home for himself and family, but that he could not remove to the place until the fall of 1874. The tract of eighty-eight acres was wholly unimproved. There was no dwelling, no house or structure of any kind upon any portion of it at the date of final settlement between the heirs, on the 27th day of Janu-

ary, 1874. The tract was merely a severed section of the original farm of the intestate.

Duerson filed his voluntary petition in bankruptcy in this court on the 23d day of January, 1874, and was thereupon duly adjudged a bankrupt. Charles S. Grubbs was appointed assignee of said estate, and received from the proper officer the usual assignment of the bankrupt's effects, by which conveyance the assignee became the owner of "all the estate, real and personal, of the said George T. Duerson, bankrupt, including all the property of whatsoever kind, of which he was possessed, or in which he was interested, or was entitled to have on the 23d day of January, A. D., 1874."

In due time thereafter, the assignee filed his report of exempted property, in which he declined and refused to set apart and designate any portion of the eighty-eight acres of land aforesaid as a homestead for the bankrupt and his family; whereupon the bankrupt appeared by his counsel and filed exceptions to the report, and prayed for a correction thereof, for the allotment of a homestead in said land, and for all proper relief. The debts proved against the estate of the bankrupt aggregate two thousand and ninety-three dollars and twenty-one cents, all of which, except one hundred and seventy-five dollars, were created prior to June 1, 1866, and all, without exception, were contracted before the acquisition of the land now claimed as exempt.

The Act of the Kentucky Legislature, approved February 10, 1866, commonly called the "Homestead Act," provides as follows: "In addition to the personal property exempted from execution by this chapter, there shall, on all liabilities created or incurred *after June* 1, 1866, be exempt from sale under execution, attachment, or judgment of any court (except to foreclose a mortgage given by the owner of a homestead or for purchase-money due therefor), so much land, *including the dwelling-house and appurtenances*, owned by the debtor, as shall not exceed in value one thousand dollars." (Genl. Stats., 433.)

And further, "All exemptions provided for in this chapter shall apply to all persons, of any race or color, who are *bona*

fide housekeepers of this commonwealth, but shall not apply to sales under execution, attachment, or judgment at the suit of creditors, *if the debt or liability existed prior to the purchase of the land or the erection of the improvements thereon.*"

It is claimed by counsel for the bankrupt that the amendment of March 3, 1873, now incorporated upon and constituting part of Section 5045 of U. S. Revised Statutes, suspended the operation of the foregoing statutes, in so far as the provisions thereof are in conflict with the law of Congress, and that under the present bankruptcy system, as amended March 3, 1873, none of the conditions prescribed by the local State law can be exacted of the bankrupt in order to entitle him to the benefits accruing under such State law; that the exemptions allowed by the several States as existing in 1871, must stand, while the conditions upon which those exemptions are guaranteed to the citizen are abolished and taken away by the superior power of Congressional enactment; that it is wholly immaterial in this case whether the debts proved were created before June 1, 1866, or thereafter; that it is immaterial whether the debts were existing prior to the purchase of the land or the erection of the improvements.

The amendment of March 3, 1873, provides that all exemptions allowed by the constitution and laws of the several States as existing in the year 1871, shall be allowed and protected by the Courts of Bankruptcy, and that such exemptions shall be valid against debts contracted before the passage and adoption of such State constitution and laws, as well as those contracted after the same. In this case the exemption of a homestead was expressly allowed by the statute law of Kentucky, provided the debts against which the exemption is claimed were contracted after June 1, 1866, or were contracted after the purchase of the land or the erection of the improvements thereon. The absence of any one of these conditions is sufficient to defeat the exemption, considered with reference to the State statute alone. Congress evidently intended, by the amendatory act of March 3, 1873, to abrogate and destroy the conditions annexed to the

exemption privileges by the State Legislatures, and to administer the local laws, shorn of these conditions.

Is the amendment constitutional? Has Congress the power to do what is attempted in the amendment of March 3, 1873? Congress has power to establish uniform laws on the subject of bankruptcies throughout the United States. (Constitution, Art. 1, Sec. 8.) Uniformity is the essence of any Bankruptcy Law enacted by Congress; and any law adopted by the Federal Legislature on this subject, which is not uniform in all its operations and results throughout all the States, is *ultra vires*, is inhibited by the organic law, and is necessarily void. No law can be uniform which prescribes rules for one State different from those prescribed for another. It seems that under the Constitution, Congress, in establishing a uniform system of bankruptcy throughout the United States, has the authority either to suspend all the exemption laws of the several States, and in lieu thereof to substitute one general law upon the subject of exemptions, applicable alike to all the States, or else to incorporate upon the body of the bankruptcy system the local laws of the States, as they exist, and cause them to be administered and enforced as parts of the general system. In the latter case the operation of the Bankruptcy Law is uniform in all its results. It changes no subsisting remedy, abridges no subsisting right, but operates alike upon all.

Though some of the District Judges have held that the amendment of March 3, 1873, is constitutional, I am thoroughly convinced that such a conclusion is not sustained by reason or authority. Chief Justice Waite, *In re* Daniel Deckert (10 N. B. R., 1), expressly decided that the act was unconstitutional. He says: "The act of 1873 excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the Bankruptcy Law, but that in each State the property *specified* in such laws, whether actually exempted by virtue thereof or

not, shall be excepted. It in effect declares by its own enactment, without regard to the laws of the States, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and creditor. Such changes to be warranted by the Constitution must be uniform in their operation. This is not." *In re* Dillard (9 N. B. R., 8), the amendment was also held unconstitutional, null, and void.

It is very evident, therefore, that inasmuch as the debts of Duerson, except to the extent of one hundred and seventy-five dollars, were all created before June 1, 1866, there can be no homestead allotted as against these debts. It is in proof that one hundred and seventy-five dollars of the indebtedness was contracted after June 1, 1866, but before the acquisition of the land now claimed as exempt. The statute disallows the exemption of a homestead against debts contracted before the "purchase" of the land or the erection of the improvements thereon. I think the word purchase, as used in the context, is synonymous with the word "acquisition." In this case the land was not "purchased," but acquired by descent. At any rate, this debt of one hundred and seventy-five dollars was created "before the erection of the improvements" on the land, and this fact of itself is fatal to the claim.

If the preceding views are untenable and unsustained by authority, there is still another, and to my mind, more satisfactory reason why the bankrupt is not entitled to the relief sought. Does the record show that Duerson ever owned a homestead? The land in controversy was never occupied by him. There was no semblance of a home upon it. He owned no specified portion of the land. His highest right therein was an undivided interest. In schedule B (1), accompanying the petition, the bankrupt describes his "interest in lands" in the following words:

"Petitioner owns forty-four acres of land in Todd county, Kentucky. Petitioner is now improving same with a present

and actual intention of making same a homestead for himself and family." This declaration was made January 23, 1874, the day on which the petition was prepared and filed. The substance of this declaration was made December 27, 1873, at the time of the verbal division of the land. Duerson had no conveyance to his land until January 27, 1874. Before and up to that date he had an undivided interest of one-seventh in and to three hundred and four acres of land. The verbal parceling out among themselves by the heirs was nugatory, binding on no one, until solemnly ratified by deeds on the 27th day of January, 1874. "No estate of inheritance, or freehold, or for a term of more than one year, shall be conveyed, except by deed or will." (Genl. Stats. Ky.) Four days *after* the commencement of proceedings in bankruptcy by the debtor, four days *after* the title to all of Duerson's property had fully vested in the assignee, deeds of partition were made. At that time Duerson had no right to convey. His assignee had, four days before that time, succeeded to all his rights in and to said estate. By operation of law, the title to Duerson's property vested in the assignee as of date January 23, 1874, the day on which the proceedings commenced. All participation by Duerson in the subsequent division of the three hundred and four acres of land was wholly unauthorized, and his acts could in no wise affect the rights of the assignee. The assignee had a direct, well-defined, tangible interest in the land, which the bankrupt could not jeopardize or prejudice.

The right of exemption, *ex rei necessitate*, exists, if at all, at the date of the commencement of the proceedings in bankruptcy. In this case Duerson owned no land *in specie*. His estate was without that "local habitation and a name" so imperatively demanded by the statute, and this defect cannot be cured by the mere declaration of an intention. Doubtless the intention was expressed. It is part of the original record in the case. It was followed up, *after the adjudication of bankruptcy*, by acts, the tendency of which was to show the good faith and honesty of the intention. A log

cabin was erected on the forty-four acres specially claimed by Duerson, and he states that he ceased building for the reason that the property was in litigation. The Kentucky Court of Appeals, in the case of *Brown Bro. & Co.* v. *Martin & Co.* (4 Bush., 47), decided that "The right of exemption of a homestead, under the Act of February 10, 1866, depends upon the actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and that this right does not exist where the residence of the debtor is located elsewhere."

In that case the defendant in the execution owned an undivided interest of one-fourth in and to a house and lot in Louisville, though he resided elsewhere, and while the court decided that if he had actually resided on the premises at the date of the levy of the execution, his undivided interest would have been exempted, it certainly does not decide that the statute exempts homesteads for the use of families, whose head owns as joint tenant, with others, real estate on which there are no improvements, no appurtenances, no dwelling-house. Unquestionably the *bona fide* intention of the debtor is of considerable value in ascertaining and settling this right, under certain circumstances, but such intention must, in order to be effectual, be followed up by something more tangible and satisfactory than its bare utterance. Temporary abandonment of property once occupied and owned as a homestead, with the continuous *bona fide* intention and purpose to return and reoccupy the place as formerly, will not defeat the right of exemption. But where there has never been a vested right, no mere declaration of purpose, however honest, can create it. The statute unquestionably contemplates an actual residence. Only such land as will include the "dwelling-house and appurtenances" can be laid off to the debtor. Debts existing before the "erection of the improvements" on the land, no matter how long the debtor may have owned the land, are expressly protected, and unless there be "improvements" on the land, such debts, when transformed into the shape of executions, shall be satisfied

out of the proceeds of the sale of such land. In the matter of D. B. Thompson, the District Court of this district, in January, 1875, decided that "The statute exempts so much land, including the dwelling-house and appurtenances, owned by the debtor, as shall not exceed in value one thousand dollars. The object of the statute is to exempt homesteads. There is no exemption unless the debtor dwell on the land sought to be exempted, and there can be no exemption which does not include the dwelling-house. The land exempted must be one connected body, and must have on it the dwelling-house of the debtor. * * * * * There can be no exemption unless the debtor owns a dwelling-house, which he can claim as exempt."

In the case under consideration Duerson owned no dwelling-house; he did not reside on the land; he had never at any time resided on it; there was no dwelling-house upon it; he owned no definite, fixed *situs;* his property was an incorporeal interest; he had never abandoned the premises with the intention to return and occupy it as a home; his residence at the date of the commencement of the proceedings in bankruptcy was located in the adjoining county; all of his debts, except one hundred and seventy-five dollars, were created before June 1, 1866; all of them were existing prior to the "purchase" (acquisition) of the land, and before the erection of the improvements thereon; his intentions are wholly unaccompanied by those antecedent facts and circumstances, without which such declarations are worthless, and none of the terms and conditions prescribed by the statute have been complied with by the complainant in this proceeding. The exceptions of the bankrupt to the assignee's report of exempted property are overruled.

WILBER F. BROWDER, *Register.*

Hon. Thomas H. Hines, for the bankrupt.

Hon. James H. Bowden, contra.

BALLARD, J.—I concur with the Register, and this opinion is in entire accordance with what has been heretofore repeat-

edly decided by me. If that is a uniform Bankruptcy Law, which adopts the exemption laws of the several States just as they exist, though those laws as they exist are variant, I cannot see how it can be successfully maintained that it is any the less uniform when it gives a uniform effect to the State laws, though different from each other in their own inherent form. As the effect given by the Bankruptcy Law to the State exemption laws is the same in all of the States, the law is in my opinion uniform in the sense of the Constitution. Situated as I am I have not had opportunity to examine the authorities referred to by counsel, or the statute which they interpret; but I am entirely satisfied that under the true construction of the Kentucky statute, and that which has been given it by the Court of Appeals, the bankrupt is not entitled to a homestead exemption. I do not hold that to entitle a debtor to a homestead exemption he must actually reside on the land in which he claims a homestead at the time of the issual of an execution against him, but I do hold that he must have a dwelling, a home there, which, if he has ever occupied, he has not abandoned, but to which he has a present purpose to return, or to which, if he has never occupied it, he is proceeding with the intention of occupying. But a homestead cannot, any more than a domicile, be acquired by a mere naked intention. The present purpose to erect at a future time a dwelling-house on land, and to occupy it as a home, is not sufficient to constitute a homestead in it. There must be a dwelling-house on it, which is occupied, or which has been occupied, and which has not been abandoned, or to which at least the debtor, if he has never occupied it, looks as his home. At the time Duerson filed his petition in bankruptcy there was no dwelling-house on the land in which he claims a homestead exemption. He doubtless had a purpose to erect a house on it, and to occupy it at some future time, but it was not then his home. His dwelling and home were then elsewhere. The exceptions by the bankrupt to the action of the assignee are overruled. The clerk will forward a copy of this opinion to the Register.

UNITED STATES DISTRICT COURT—OREGON.

A witness summoned before the Register on the application of the assignee, to be examined under Section 5087 of the Revised Statutes, is not a "party" to such proceeding, and is therefore not entitled "to take the opinion of the District Judge upon any point or matter arising in the course of such proceeding."

A witness summoned as aforesaid, not being a "party" to the proceeding, is not entitled to be attended or represented by counsel during his examination.

A creditor of the bankrupt is not a "party" to such proceeding, and is therefore not entitled to interfere with it, or be represented in it by counsel.

An assignee can only be represented in the written proceedings by his duly-appointed attorney; but this does not prevent another attorney from appearing in court, as counsel for the assignee in a particular proceeding therein pending, as provided in Section 1000 of the Oregon Civil Code.

An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee.

In re C. B. COMSTOCK & CO.

DEADY, J.—On the application of the assignee, W. W. Francis was summoned before the Register to be examined in the above-entitled matter.

Upon the appearance of Francis before the Register, he was accompanied by an attorney of this court, who offered and desired to appear as attorney for the witness and also for the Bank of British Columbia, a claimant against the estate of Comstock & Co.

Counsel for the assignee objected to the appearance of counsel for the witness or the bank, on the ground that neither the witness nor the bank is a "party" to the proceeding, although it was admitted that the proposed examination of the witness had reference to "an affair of the bankrupts with the said bank, on and about November 14, 1873."

The Register ruled that the "witness is not entitled to counsel," and that "the bank cannot appear in this proceeding by counsel," and the question—"Shall the ruling of the Register be sustained?" was certified to the judge for decision.

No person is entitled, under Section 5010 of the Revised Statutes, "to take the opinion of the District Judge upon any point or matter arising in the course of the proceedings" before the Register, unless he is a "party" thereto. The witness Francis is not a party to this proceeding. The only party to it is the assignee. The law gives him the right to examine this witness with reference to the affairs of the bankrupt, so as to enable him to act intelligently in the premises. The witness is no more a "party" to the proceeding than if he was being examined on behalf of the plaintiff or defendant in an ordinary action.

Neither is the bank a party to this proceeding. The examination of the witness is *ex parte*, and cannot be used as evidence against the bank, in any action or proceeding to which it is a party. As has been stated, it is taken solely for the information of the assignee, to enable him, as the representative of all the creditors, to understand and assert or defend their rights in the premises. (*In re* Fredenberg, 1 N. B. R., 268; *In re* Fienberg *et al.*, 2 N. B. R., 475; *In re* Fay, 3 N. B. R., 660; *In re* Stuyvesant Bank, 7 N. B. R., 445.)

This being so, the Register might properly have refused to certify this question. (*In re* Fredenberg, *supra.*) Indeed, I think he *ought* to have refused it and proceeded at once with the examination of the witness.

But, for the same reason—that the witness is not a "party" to the proceeding—he is not entitled to counsel. It is only *parties* who are thus entitled. In this proceeding, whatever interest he may have in the matter sought to be inquired into, if any, Francis is merely a witness, and is no more entitled to appear or be attended by counsel than he would be, if called as a witness in an ordinary action.

The same is true of the bank and for the same reason. It is not a "party" to the proceeding, and the information elicited by it is merely for the benefit of the assignee. If the examination discloses the fact that the knowledge of the witness is or may be material in any controversy with the assignee, to which the bank is or may be a party, before

such knowledge could be used against the bank, he would have to be called and examined, subject to cross-examination as an ordinary witness, in such controversy.

The attorney who offered to appear as counsel for the witness and the bank, also objected that the attorney who appeared as counsel for the assignee was not "*the* attorney of the assignee," and therefore not entitled to appear for him upon this proceeding.

While I have no doubt that the assignee can only be *represented* in the written proceedings by his duly appointed attorney, yet I see no reason why another attorney may not appear in court, as counsel for the assignee, in a particular proceeding therein pending, as provided in Section 1000 of the Oregon Civil Code.

But the attorney seeks to appear for the witness, that has no standing before the court in this proceeding, and therefore cannot be heard to question the authority of the attorney who appears as counsel for the assignee. For the same reason, the question arising upon such objection ought not to have been certified.

The rulings of the Register are affirmed, and the clerk will certify a copy of this decision to him, and is hereby required under Rule 58, to tax the expenses of this certificate, together with a sum of five dollars, to be paid to the assignee or his attorney, against the attorney who sought to appear for the witness.

SUPREME COURT—MASSACHUSETTS.

A discharge cannot be impeached in a State court on the ground that the name of the creditor was fraudulently omitted from the schedule, and he had no notice of the proceedings.

GEORGE N. BLACK v. *WILLIAM A. BLAZO.*

CONTRACT on a promissory note. Trial in the Superior Court before Pitman, J., who ordered a verdict for the defend-

ant, and reported the case for the determination of this court. The nature of the case appears in the opinion.

R. D. Smith, for the plaintiff, cited *Batchelder* v. *Low*, 43 Vt., 662; *Payne* v. *Able*, 7 Bush., 344; *Hoyles* v. *Blore*, 14 M. & W., 387.

C. G. Keyes, for the defendant.

MORTON, J.—This is an action of contract upon a promissory note. The defense was a discharge in bankruptcy. The plaintiff filed a replication, alleging that the plaintiff's name was fraudulently omitted from the schedule of creditors filed in the bankruptcy proceedings by the defendant, that the plaintiff had no notice of the proceedings, and that therefore the defendant's discharge was invalid. The Superior Court correctly ruled that the defendant's discharge "could not be impeached in this court for any reasons" set forth in the replication.

The case of *Way* v. *Howe*, 4 N. B. R., 677; 108 Mass., 502, is decisive against the plaintiff. In that case, the fraud alleged was a fraudulent conveyance by the bankrupt in violation of the Bankrupt Act, and the judgment of the court proceeded upon the ground that the remedy given by application to a District Court of the United States, under the 34th Section of the Bankrupt Act, is exclusive of any other mode of impeaching the validity of a discharge, either in the Federal or the State courts, on account of such fraud.

The reasoning of the court upon which that judgment is founded applies with equal force to a case where the alleged fraud is the fraudulent omission of the creditor's name from the bankrupt's schedule. This fraud, like a fraudulent conveyance of property, invalidates a discharge under the 29th Section of the Bankrupt Law, and therefore furnishes a ground for an application to set it aside under the 34th Section. (*Burpee* v. *Sparhawk*, 4 N. B. R., 685; 108 Mass., 111.) The last-named section provides in the same breath for a remedy to try the validity of a discharge, in all cases of alleged fraud under the 29th Section. It is impossible to

hold that this remedy is exclusive in one class of cases and not exclusive in others.

As the general subject has been fully considered in the two recent cases above cited, we merely refer to those cases and the authorities therein cited, without re-stating the arguments.

Judgment on the verdict.

SUPREME COURT—MASSACHUSETTS.

If the court is satisfied that the refusal, on a suggestion of his bankruptcy, of a continuance, has worked injustice to a defendant, it may in its discretion grant him a review.

If a motion was made for a continuance upon a suggestion of the defendant's bankruptcy, before judgment, a discharge may be pleaded on the allowance of a writ of review.

FREDERICK W. TODD et al. v. *CHARLES F. BARTON et al.*

WRIT of review to reverse a judgment recovered by the defendants in review against the present plaintiffs, on a promissory note signed by them. Trial in the Superior Court, before Dewey, J., who allowed a bill of exceptions in substance as follows:

The original action was commenced by an actual attachment of the defendants' property, on December 13, 1871, on a writ returnable to the Superior Court for the county of Suffolk, at January Term, 1872. They gave a bond to dissolve the attachment, and the writ was returned and entered. After an answer to said action was filed, they filed their petition in the District Court of the United States, on February 2, 1872, to be declared bankrupts, and on March 2, 1872, suggested their bankruptcy on the records of the Superior Court in the cause, and filed a written motion to continue the cause to await the result of the proceedings in bankruptcy. At April Term of the said court, to wit, on June 6, 1872, the cause was called for trial, and the defend-

ants, not being present in court, were defaulted, although the attention of the presiding justice was called to the motion on file. On June 22, judgment was entered against them, and on June 26, execution issued. It was agreed that at the time of entering judgment and awarding execution, there was no defense to the action on the merits, and that these defendants were then entitled to judgment, unless the cause should have been continued on account of the suggestion of bankruptcy.

In March, 1873, the defendants obtained their discharge in bankruptcy, and on June 16, 1873, having obtained leave of the Superior Court, on petition, brought this writ of review, returnable at July Term, 1873. At January Term, 1874, the cause coming on to be heard, the plaintiffs in review moved for leave to file an additional answer, setting up the discharge in bankruptcy obtained in March, 1873. The defendants in review objected to the allowance of the amendment, as it would set up a defense in bar which did not exist when the original judgment was rendered, but the judge allowed the amended answer to be filed, and the defendants in review alleged exceptions. The defendants in review then proved their case as laid in their original declaration, and rested. The only defense relied upon by the plaintiffs in review was their suggestion of bankruptcy on the record, and the motion for continuance at the time of the default, and the discharge in bankruptcy obtained in March, 1873, which they offered in evidence in bar to the action. The defendants in review objected to the admission of the discharge in evidence, but the judge admitted it, and the defendants in review alleged exceptions. The plaintiffs in review then rested their case. The defendants in review asked the judge to rule that this discharge was no bar to their recovery in this action; but the judge being of opinion that the discharge was a bar, declined so to rule, and directed a verdict for the plaintiffs in review; and the defendants in review alleged exceptions.

W. H. Towne, for the defendants in review.

No counsel appeared for the plaintiffs in review.

GRAY, C. J.—The objection that the writ of review was improperly granted is not open. It was within the discretion of the Superior Court, if satisfied that the refusal of a continuance had worked injustice to the petitioner, to grant him a review; and the exercise of its discretion was not subject to exceptions. (*Reynard* v. *Brecknell*, 21 Mass., 301, 304; *Boston* v. *Robbins*, 116 Mass., 313.) *A fortiori*, no exception having been taken, at the hearing upon the petition, to the order granting a writ of review, the objection to that order could not be first taken at the hearing upon the writ.

It is further contended that the discharge in bankruptcy, having been obtained since the original judgment, could not be pleaded upon the review, because no defense is open on a review which could not have been made to the original action. (*Hart* v. *Johnson*, 7 Mass., 472; *Foster* v. *Plummer*, 57 Mass., 381.) But the bankruptcy of the defendant was suggested, and a motion for a continuance to await the determination upon the question of his discharge made, in the original action, before judgment. The object of that motion, and its effect, if granted, would have been to enable him to plead his discharge in bankruptcy, when obtained. (U. S. St. 1867, Chap. 176, Section 11; *Cutter* v. *Evans*, 11 N. B. R., 448; 115 Mass., 27.) Pleading that discharge did but perfect the same defense which had been set up in the original action, and was therefore rightly allowed upon the review.

Exceptions overruled.

UNITED STATES DISTRICT COURT—OREGON.

A petition to have a corporation adjudged a bankrupt may be maintained under Section 5122 of the Revised Statutes by *any creditor* of such corporation, and the provision of Section 12 of the Act of June 22, 1874, in relation to the number and amount of the creditors required to join in such petition against a natural person does not apply.

The original Bankrupt Act of 1867, and all the acts amendatory thereof, except the Act of 1874 aforesaid, were superseded by the Title BANK-

RUPTCY of the Revised Statutes, and repealed by Section 5596 of said statutes.

Quære, whether such appeal took effect from the enactment of the Revised Statutes, on June 22, 1874, or from December 1, 1873, the date on which said statutes took effect, as declared in Section 5595 thereof.

In re THE OREGON BULLETIN PUBLISHING AND PRINTING CO.

George H. Durham, pro motion.
Joseph Simon, contra.

DEADY, J.—On September 10, 1875, Blake, Robbins & Co., of San Francisco, Lewthwaite & Smith, H. W. Scott and H. L. Pittock, of Oregon, filed their petition in bankruptcy against the *Oregon Bulletin Publishing and Printing Co.*, a corporation duly formed under the laws of Oregon, stating that they constituted one-fourth in number and one-third in value of the creditors of such corporation, and that the same owed each of them debts amounting in the aggregate to four thousand four hundred and eighty-one dollars; that within the six calendar months next preceding the date of said filing, said corporation committed five several acts of bankruptcy; for that, being insolvent, said corporation did make four certain payments to certain of its creditors, amounting in the aggregate to sixteen hundred and ten dollars, with intent to thereby give such creditors a preference, and also procure its property to be taken on legal process, for the purpose of foreclosing a chattel mortgage held by one of its creditors for the sum of six thousand dollars, and praying that for these causes said corporation may be adjudged a bankrupt.

On September 21, the corporation filed an answer to the petition, containing, among other things, a denial that the petitioners constitute one-fourth in number and one-third in value of the defendants' creditors; and also a separate statement in writing to the same effect.

The petitioners now move to strike out said denials as being irrelevant.

The motion is made upon the ground that a petition to have a corporation adjudged a bankrupt is not, as to the number and value of the creditors necessary to join therein, within the purview of Section 39 of the Bankrupt Act, as amended by Section 12 of the Act of June 22, 1874, but is governed in this respect solely by Section 5122 of the Revised Statutes. The latter section is given in the Title BANKRUPTCY of the Revised Statutes, in place of Section 37 of the Act of 1867. By the latter the provisions of the act were applied to corporations. It provided that a corporation might be declared a bankrupt "upon the petition of any creditor or creditors" of the same, without any reference to the value of their debts.

The section, as contained in the Revised Statutes, provides that the provisions of the act shall apply to private corporations, and that—

* * * "upon the petition of any officer of any such corporation, * * * duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or *upon the petition of any creditor of such corporation* * * * *made and presented in the manner provided in respect to debtors*, the like proceedings shall be had and taken as are provided in the case of debtors."

The section further provides substantially as follows:—1st. All the provisions of the act "which apply to the *debtor* or set forth his duties" in relation to the bankruptcy are made applicable to the officers of such corporation. 2d. All payments, etc., declared fraudulent and void when made by a *debtor* are declared to have the same effect when make by a corporation. 3d. *All* the assets of a corporation declared bankrupt are to be distributed to its creditors, and no allowance or discharge is to be granted to it.

The Revised Statutes of the United States appear to have taken effect from December 1, 1873 (Section 5595 *et seq.*), but were not enacted until June 22, 1874. They contain the Title BANKRUPTCY, numbered LXI., which was intended as a substitute for the Bankrupt Act of March 2,

1867. On the same day Congress passed "An Act to amend and supplement" said Act of 1867. By this latter act, Section 39 of the original act, the same constituting Sections 5021, 5022, and 5023 of the Revised Statutes, was amended so as to require at least one-fourth in number and one-third in value of the creditors of a natural person to join in a petition to have him declared a bankrupt. Prior to this amendment it was only necessary that one or more creditors, the aggregate of whose debts amounted to two hundred and fifty dollars, should join in such petition.

By means of Section 5022 the statute is first applied to corporations. Upon its language it cannot be contended that any particular number of creditors whose debts are of any particular value are required to join in a petition to have a corporation adjudged a bankrupt. The words of the section are unambiguous and too plain to leave any room for construction. "Upon the petition of *any creditor* of such corporation, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors." The petition may be brought by "any creditor" of the corporation, without reference to the number of its creditors or the aggregate of their debts. True, the petition is to be "made and presented *in the manner* provided in respect to debtors." But surely, a direction as to the *manner* in which a petition is to be made and presented, does not touch the question *by whom* it is to be made and presented—more especially when, as in this case, the statute in that immediate connection—as it were in the same breath—declares that it may be made and presented by *any creditor* of the corporation.

Does Section 39, as amended by the Act of June 22, 1874, expressly or by necessary implication modify or amend Section 5122 of the Revised Statutes in any particular?

The Act of 1874 was passed on the same day as Section 5122. They are exactly cotemporaneous, and therefore there is nothing to be said in favor of such modification, upon the ground that Section 39 is the later expression of the legisla-

tive will. If there really is any conflict between the two sections, there is as much reason for holding that Section 39 must yield to Section 5122 as otherwise, so far as the time of their enactment is concerned.

Again, the Act of 1874, although it contains a general repealing clause (Section 21), as to "all acts and parts of acts inconsistent with its provisions," does not contain any *general* amendments to the Act of 1867, leaving the court to ascertain as best it might how far and where they are in conflict with the original, and therefore repeal it by implication. On the contrary, all the amendments are specific, each section amended is named. The amendment is made by either striking out or inserting particular words at particular places, or, as in the case of Section 39, by reforming the section so as to embody in it the desired changes, and then enacting it as amended. The rest of the sections are supplementary to the original act, and not in conflict with it.

There is, then, no reason to presume that the amendment to Section 39, providing who must join in a petition to have a natural person adjudged a bankrupt, was intended to amend or modify Section 37 of the Act of 1867 or its substitute, Section 5122, as to who might maintain a petition to have a corporation declared a bankrupt. On the contrary, if it was intended to amend this section so as to require a certain proportion in number and amount of the creditors to join in a petition for that purpose, the inference from the circumstances is satisfactory, that it would have been done specifically and directly, as in the case of the other twelve amended sections.

Section 5122 not being amended by the Act of 1874, it and Section 39 stand in the same relation to one another that they did in the original act. By that, as has been shown, while a natural person could only be declared a bankrupt upon the petition of one or more of his creditors, whose debts, in the aggregate, amounted to two hundred and fifty dollars, a corporation might be so declared upon the petition of such creditors without reference to the amount of their debts.

The two sections are separate provisions relating to distinct subjects—the one, the involuntary bankruptcy of natural persons and the other that of corporations. They are not contradictory or in conflict, and both may stand and have effect upon the subject-matter to which they respectively relate.

The reason of the difference between the two sections may not be so apparent as the difference itself. But several reasons suggest themselves. In the case of a corporation the bankrupt is neither entitled to any allowance or a discharge. By reason of the adjudication it is in effect dissolved, and its existence terminated. There is nothing left to grant a discharge to. It is stripped of all its property and rights of property, and can acquire no more. The law creates it and the law destroys it. But in the case of a natural person, the bankrupt is entitled to an allowance and a discharge from his debts upon certain conditions, and by the Act of 1874 (Section 12) in a case of compulsory bankruptcy, he is entitled to a discharge without reference to the proportion between his assets and debts, "or the assent of any portion of his creditors." On this account it may have been thought necessary to require, in the case of a natural person, a certain proportion in number and amount of the creditors to join in the petition to prevent collusion between a debtor and a friendly creditor. The very fact that the Act of 1874 (Section 12) requires the judge to be satisfied that the *written admission* of the debtor that the requisite number and amount of creditors have petitioned to put him into bankruptcy *is made in good faith*, gives strong color to this suggestion. When a statute requires a court to be satisfied that an admission in the pleadings of the defendant that the plaintiff is entitled to sue, is made in good faith, it is a reasonable inference that the enactment was intended to guard against collusion.

Again, it is well known that the amendments contained in the Act of 1874 were passed under the influence of the panic of 1873. Under such circumstances, sympathy for the debtor

class may have induced Congress to provide that a natural person should not be forced into bankruptcy except upon the petition of a large proportion of his creditors, and thereby prevent his being pressed to the wall, unless in an extreme case; while, in the case of an artificial person, as a corporation, which is created upon the implied condition that its existence depends upon its solvency, no such consideration would or ought to have effect.

By the laws of most civilized countries, mere inability to pay its debts is a cause of dissolution against a corporation. Being insolvent, it has ceased to fulfill the law of its being, and ought no longer to exist, unless by the consent or forbearance of all its creditors. But if Section 39, as amended by the Act of 1874, is applicable to corporations, then their existence may be prolonged with impunity, against the wishes and interests of any number of the creditors less than one-fourth in number and one-third in value of the whole, long after they are both insolvent and bankrupt.

Or it may be that the difference between the two sections is a *casus omissus*—the result of a mere oversight on the part of Congress.

But however this may be the distinction exists, as to who may maintain a petition in involuntary bankruptcy. One rule is prescribed in the case of a corporation and another in that of a natural person. To confound or obliterate this distinction by construction—by the merest assumption that Section 39 was intended to modify Section 5122—is not only going beyond the office and power of a court but in a direct opposition to it.

As is well said by a distinguished commentator:

"Upon all acts of the Legislature, such construction should be made as that one clause shall not frustrate or destroy, but on the contrary, shall explain and support another—*sound exposition requiring effect to be given to every significant clause, sentence, or word in a statute.*" (Smith's Com., Section 575.)

On the argument of the motion counsel for the defendant

cited the clause in Section 5013 of the Revised Statutes (Section 48 of the act), which declares that in the Title BANKRUPTCY, "the word 'person' shall also include corporation," and argued therefrom, that as by Section 39 a "person" can only be adjudged a bankrupt upon the petition of a certain proportion of his creditors, so is it, also, in the case of a "corporation," for the reason, that the word "person" being made to include that of "corporation," any provision of this title relating to a "person" is also applicable to a "corporation."

This conclusion may be admitted so far as the statute does not otherwise expressly or by necessary implication provide. For instance, the statute provides that a "person" shall be entitled to a certain allowance out of his property, and under certain circumstances to a discharge from his debts. Now in these two cases, the word "person" does not include a corporation, because the statute (Section 5122, Revised Statutes) expressly provides that "no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof."

But the clause cited from Section 5013 of the Revised Statutes, declaring that the word "person" in the Title BANKRUPTCY shall include "corporation," has no application to Section 39 of the Act of 1867, as amended by Section 42 of the Act of 1874.

A few words will make this apparent. The original Act of 1867 and all the acts amendatory thereof, prior to that of 1874, are no longer in force. They are superseded by the Title BANKRUPTCY, of the Revised Statutes, which is itself a new statute, differing in many particulars from the original one, and were repealed by Section 5596 of the Revised Statutes on December 1, 1873, or June 22, 1874.

Therefore, Section 48 of the Act of 1867, containing this definition of the word "person," is no longer in force. Section 5013 has taken its place; but this section, in declaring the word "person" to include a corporation, limits its operation to the Title BANKRUPTCY of the Revised Statutes. Now, Section

39 of the Act of 1867, as amended by Section 12 of the Act of 1874, is no part of the Revised Statutes, but is an independent statute passed on the same day as the latter. So it follows, that the word "person" in that section is not to be enlarged in its operation on account of the definition given to it as used in the Revised Statutes, Title BANKRUPTCY.

But it may be conceded that in the absence of any statute definition to that effect, the word "person" should be construed to include a corporation, unless it appears that it was used in a more limited sense. Such is the rule prescribed in Section 1 of the Revised Statutes, which provides that, "in determining the meaning" of said statutes, or any act of Congress passed subsequent to February 25, 1871, "the word 'person' may extend and be applied to partnerships and corporations, * * * * * unless the context shows that such word was intended to be used in a more limited sense."

The Act of 1874 being passed since 1871 is within the purview of this provision, and therefore the word "person," wherever it occurs in it, ought to be construed to include a corporation, unless the context shows that such was not the intention. On this point there can be but little, if any, doubt. The context, which is the Title BANKRUPTCY, of the Revised Statutes and the contemporaneous Act of 1874, shows plainly that the application of the statutes of bankruptcy, including Section 12 of the Act of 1874, to corporations, is generally provided for in Section 5122 of the Revised Statutes, and particularly as to who may maintain a petition against a corporation.

It was also objected to this motion by counsel for defendant, that the allegations sought to be stricken out were made in response to an allegation in the petition. So far as I have looked into them, there seems to be some conflict or confusion among the authorities upon this point. None were cited on the argument.

I think the better rule is to allow a motion to strike out irrelevant or immaterial matter in a pleading, although it may

be a mere denial of an immaterial allegation in a prior pleading. But in such case, the motion, in analogy to the rule in case of a demurrer, should be held to reach back to and include the first fault.

The motion to strike out is allowed, including the allegation in the petition concerning the number and amount of the creditors joining therein.

UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

An adjudication entered on the 22d day of June, 1874, may be set aside on the motion of the debtor, if the provisions of the act passed on that day were not complied with.

In re CARRIER & BAUM.

PETITION of Andrew F. Baum for a revocation of the adjudication and a dismissal of the bankruptcy proceedings.

On the 11th day of June, 1874, John Heath, a creditor of the firm of Carrier & Baum, filed a petition in the District Court of the United States for the Western District of Pennsylvania, for the adjudication of the said firm of Carrier & Baum in bankruptcy. The petition was regular and properly verified under the Act of March 2d, 1867. A rule to show cause was issued and duly served, and on the 22d day of June, A. D. 1874, no answer having been filed, the court adjudged said firm bankrupts, according to the prayer of the petition filed on the 11th of June.

On the 15th day of May, 1875, Andrew F. Baum presented a petition to the court setting out the passage of the amendment of June 22d, 1874, and alleging that the requisite proportions of the creditors of the firm had not joined in the petition, as required by the amendment to the Bankrupt Act,

and asking that the adjudication be set aside and the proceedings dismissed.

The order of adjudication was made about ten o'clock in the morning of the 22d day of June, 1874.

The question discussed by counsel during the argument was, whether the act went into effect from the first hour of the day of its approval, or from the actual time of the signing by the President.

McCandless J.—The adjudication set aside, and the creditors have leave to proceed under the amendment to the Bankrupt Act of June 22, 1874.

SUPREME COURT—MASSACHUSETTS.

If the bankrupt delivered goods to the workmen of a creditor, upon the credit of the creditor, with the expectation that they would be paid for at the next pay-day, there is no preference, although the creditor subsequently applies the amount to a pre-existing debt.

The presumption that a man intends the natural and probable consequences of his acts, is only one element of proof to establish the fact of actual intent.

EDWIN RICE et al. v. *GRAFTON MILLS.*

Tort by the assignees in bankruptcy of Asa J. Smith, for the conversion of certain goods alleged to have been delivered by the bankrupt to workmen of the defendant on the credit of the defendant, as a fraudulent preference under the provisions of the United States Bankrupt Act, U. S. Statutes of 1867, Chap. 176. Trial in the Superior Court, before Allen, J., who allowed a bill of exceptions in substance as follows:

The evidence tended to show that Smith went into business as keeper of a grocery and variety store on April 1, 1869. The following order, signed by the treasurer of the defendant corporation, was then delivered to him by the defendant:

"NEW ENGLAND VILLAGE, MASS., April 1, 1869.

"To avoid the inconvenience of frequent orders and payments of money to our help, at our counting-room, will you please deliver to persons employed by the Grafton Mills, such goods and articles as they may desire, or orders for the same, including money, to an amount not exceeding the balance of their accounts found by deducting from their wages and credits any charges which we may have against them. And you will please render an account at the close of each month, and whenever any person shall cease to be employed by us, of the amount of goods and articles delivered to them on our account in accordance with this order,—they, however, having first subscribed their names in this book, as evidence of their understanding that for the goods, etc., thus delivered to them, they are indebted to the Grafton Mills and not to you."

The order was contained in a book kept at Smith's store until May, 1870, and was up to that time signed by only seven operatives. In May, a larger number of names was added by the procurement both of the defendant and Smith. About the time Smith commenced business, the defendant lent him three thousand five hundred dollars, and charged it on account. All but nineteen hundred dollars of this amount was paid before January 1, 1870, and that amount remained due until after July 1, 1870. The account of the defendant against Smith was thus reduced to nineteen hundred dollars by means of a transfer of accounts, not connected with the delivery of goods under the arrangement, and the account was balanced every month, and the balance of nineteen hundred dollars was carried forward from month to month. About January 1, 1870, the balance was taken out of the general account of Smith on the books of the defendant, and placed by itself on an account marked No. 2. About July 1, it was replaced in the general account. The book-keeper testified that it was transferred to a separate account for his convenience as book-keeper, and replaced, he thought, by di-

rection of the treasurer. It appeared that at the same time the nineteen hundred dollars was transferred on Smith's books to a second account, and restored to the first account after July 1, 1870. The workmen of the defendant traded at Smith's store, received various articles which were charged to them from month to month, and at the end of the month Smith handed in to the defendant a list of the names of those who had received goods under this arrangement, and the gross amount was credited to Smith on their books, and the amounts received by the respective workmen were charged to them respectively. Goods had been delivered after the date of the order to the great majority of the workmen who signed the order in May, before they had signed it, and the accounts for such goods were sent in by Smith to the defendant's counting-room. On or about the 20th of each month from May, 1869, to and including July, 1870, the defendant paid Smith for the amount of goods delivered the previous month, and charged the amount so paid in account. On August 22, 1870, Smith's store was shut up by attachment. The amounts of goods delivered in July and August were credited by the defendant to Smith. He went into bankruptcy, October 25, 1870. Smith testified that when the goods were delivered in July and August to the workmen, he expected the defendant would pay him therefor about the 20th of August and September, 1870, respectively, and did not know they were not going to until his store was shut up. There was other evidence in the case relating to the point controverting the testimony of Smith. The amount of goods delivered in July and August, 1870, was about fifteen hundred and eighty dollars, and applied to the balance due from Smith to the defendant, reduced it to about four hundred and thirty-seven dollars. There was evidence tending to show that Smith was insolvent in July and August, 1870, and that the defendant had reasonable cause to believe that Smith was insolvent when the goods were delivered.

The defendant asked the judge to instruct the jury as follows: "If Smith at the time of the delivery of the articles, or

any of them, expected that the defendant would pay him the amount thereof at the next pay-day, then, as to such articles, the plaintiff cannot recover, although afterwards the defendant refused to pay, and credited the amount of them on account."

The judge refused to give this instruction, and instructed the jury that if the goods were delivered under a contract by which the defendant had the option to apply them to a pre-existing debt, and if Smith knew it, and was insolvent and had reason to believe he was insolvent, and the defendant did apply the goods to a pre-existing debt, that would be competent and sufficient evidence on which to find that he intended a preference, although Smith expected and supposed when the goods were delivered that the defendant would pay him for the goods, if he delivered them with the knowledge that the defendant had the authority to apply them to the preceding debt.

The judge further instructed the jury that the contract or order under which the goods were delivered did give the defendant an option to apply the goods to a pre-existing debt.

The jury found for the plaintiffs, and to the foregoing rulings and refusals to rule the defendant alleged exceptions.

H. B. Staples & F. P. Goulding, for the defendant.

W. S. B. Hopkins, for the plaintiffs.

WELLS, J.—The question presented by this bill of exceptions, is not whether the facts stated and evidence reported were sufficient to authorize the jury to find that Smith intended a preference; but whether they could so find, notwithstanding they should also find that he "expected and supposed, when the goods were delivered, that the defendant would pay him for the goods" at the next pay-day.

We must assume that all the other propositions, stated hypothetically in the instruction given to the jury, were found by them to have been established; to wit, that Smith was insolvent when he delivered the goods, and had reason to

believe that he was so; and also that he knew that the defendant would have the right to apply the account, for goods so delivered, upon his previous debt, if there should be occasion, or if the defendant's officers should see fit so to do. But it is not to be assumed that the jury found that Smith actually knew or supposed himself to be insolvent, or that he was acting "in contemplation of insolvency;" because no such proposition was embraced in the instruction, or in the statement of facts. Nor is any inference to be drawn from the evidence contrary to the hypothetical statement of the instruction, that "Smith expected and supposed" that the goods would be paid for. The correctness of the instruction must be determined by the propositions it contains; because the jury were authorized to render their verdict upon those alone, and may be supposed to have done so. The force of the exception is not met by arguments upon the evidence in support of the verdict, or to show that it might properly have been rendered upon grounds not presented in the instruction excepted to. The question is of the correctness, not of the verdict, but of the instructions upon which it was rendered.

The written contract or order, under which these goods were delivered, contained no reference to a previous debt of Smith for money borrowed of the defendant. If the goods were delivered upon the expectation and supposition that they would be paid for at the usual pay-day of the defendant corporation, there is nothing in the case to warrant the inference that they were delivered in payment of the loan with the expectation of a further loan of the same amount. And if the facts or evidence would warrant an argument to that effect, it would be a perversion of the language of the instruction to ascribe that sense to the words used, that the defendant "would pay him for the goods." We must therefore, in fairness to the judge as well as to the excepting party, construe the reference to the option, under the contract, to apply the amount due for the goods to a pre-existing debt, as meaning only the option which the defendant would

have as a creditor to take advantage of the legal right of set-off.

The intent to prefer is essential, and is to be found by the jury. (*Denny* v. *Dana*, 56 Mass., 160, 172; *Judd* v. *Gibbs*, 69 Mass., 539, 544; *Toof* v. *Martin*, 6 N. B. R., 49; 13 Wall., 40.) A preference was not the direct or necessary consequence of the acts of Smith. A man may, indeed, be presumed to intend the natural and probable consequences of his own acts. But that presumption is only one element of proof to establish the fact of actual intent. The evidence does not show that, prior to the attachment by which Smith's business was interrupted, the probability that the defendant would insist upon a set-off, and thus secure a preference, was so obvious as conclusively to maintain the proposition that he contemplated it, and sold and delivered the goods with a view to such a preference; especially against the fact assumed by the instructions that he "expected and supposed" otherwise.

We are of opinion that in authorizing the jury to find an intent to prefer, upon the facts of this case, contrary to the actual expectation and supposition of the debtor, the instruction of the court was erroneous.

Exceptions sustained.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

In composition cases the Register is entitled to five dollars for incidental expenses; three dollars for the meeting; five dollars when acting under a special order; ten cents for filing each paper; twenty cents for each folio of the examination; twenty-five cents for each affidavit; one dollar for ordering an adjournment of a meeting, and ten cents for each folio of the report.

When the resolution has been definitely passed upon, the business of the meeting is over and no adjournment is needed.

The confirmation need not be presented at the meeting of creditors.

If the confirmation is presented to the Register, the time spent in examining it may be considered as spent under a special order.

No memoranda are necessary in composition cases.

In re BENJAMIN F. SPILLMAN.

LOWELL, J.—In examining the question of the fees of the

Register in the case of composition, I have found that the fee bill, though not specially intended to reach such cases, may be applied to them. Without tracing all the items of charge in this case, I will point out such as seem to be allowable:

First. The general docket fee for office and incidental expenses, five dollars.

Second. For general meeting of creditors, three dollars.

Third. For service under order of court not exceeding, per day,* five dollars.

Fourth. Filing papers, not before filed with Clerk, each† ten cents.

Fifth. Examination of bankrupt taken down in writing, for each folio, twenty cents.

Sixth. For affidavits when necessary, each twenty-five cents.

Seventh. Adjournments. A large part of the fees proposed to be charged in the bill sent in by the Register are derived from adjournments and adjourned meetings. I understand the ground for making such adjournments was that the confirmation was incomplete. The statute does not contemplate that the confirmation should be made at a meeting, nor that it should be presented to the Register. The debtor may procure it within any reasonable time after the meeting. Knowing that they often were presented and filed, I required the Register's opinion upon them if filed with him. My orders are perhaps annulled by the action of the Supreme Court. Whether so or not, I shall at once repeal them. I do not understand the Supreme Court to require the Register to pass upon the confirmation, and he is at liberty to refuse to do so. If he does examine it he may be considered to do

* I suppose in most cases the responsible duty which is put upon the Register to examine and report will take time beyond and besides the holding of the meeting.

† A paper signed by any number of persons is but one paper. This was long since decided in taxing fees of the Clerk.

so under a special order, and the time taken may be added to that spent in examining the resolution itself. Whenever the resolution has been definitely passed upon by the creditors assembled in person or by proxy, the business of the meeting is over. I believe it has been ruled in England that such a meeting cannot be lawfully adjourned, excepting by such a vote as would be requisite to pass the resolution. How that may be by our law I have not had occasion to decide. When an adjourned meeting is necessary (if ever) a fee for ordering it, one dollar; and for holding it, three dollars.

Eighth. Memoranda. The short memoranda are not necessary in composition cases, because the report which the Register is required to make of the proceedings includes them. The memoranda are needed in ordinary cases to keep the creditors, who may choose to apply to the court, informed of the state of the proceedings from time to time during the months or years that the case may be pending. In composition cases the Register ought to keep a docket and minutes, and can send them up if called for. He may, however, tax the folios of his report itself, for each folio, ten cents.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A Register is not bound to countersign a check unless the fee is first tendered to him.

A Register has a lien on the fund in court which has been awarded to a party.

A party who seeks to review an act of a Register must do so in a respectful manner.

A wanton attack upon the character of a Register in a paper filed before the judge is a contempt of court.

In re WILLIAM P. BRECK & WILLIAM B. SCHERMERHORN.

I, THE undersigned Register in charge of the above-entitled

matter, do hereby certify that a paper purporting to be affidavits of certain parties, with an indorsement thereon by the District Judge, in the words "I should be glad to have Register Williams examine these papers, and state whether there is any reason why I should not countersign the check. S. B." has been filed with me.

In answer to the inquiry put by the District Judge I beg to say that General Order No. 30 allows the Register ten cents for certifying a check, and General Order No. 29 provides that the "fee of the Registers * * * shall be paid or secured in all cases before they shall be compelled to perform the duties required of them." As there is no pretense that this fee of ten cents for certifying the proffered check was tendered or secured, there was clearly no obligation on my part to countersign the check.

I believe this will be a sufficient answer to the question put to me by the District Judge—for it will not be suggested that a precedent should be established to the effect that whenever a Register refuses to perform a duty for want of payment of the fee prescribed therefor, the judge will for that reason perform the duty himself.

There are other reasons why the District Judge should not countersign the check in question. This matter came before me upon an order of reference requiring me to take testimony upon the issue and report the same to the court, with my opinion thereon. Such testimony was promptly taken and a careful opinion was written thereon. A bill for such services, which I presume to be correct, was presented to the attorney, and payment of it was refused. I, however, sent up the papers, notwithstanding such non-payment. After they had been sent up, some papers were handed to me as from the attorney, which—as they did not belong on file, and had, for the reason aforesaid, no significance—I at once returned to him. The decision of the court was adverse to my opinion, and the claimant was allowed the sum of two hundred and thirteen dollars and thirty-four cents. Upon that money I have a clear and unquestionable *lien* for my fees. If the

District Judge shall countersign the check, the money will be drawn thereon, and my lien will be taken away. For the services rendered under the order of reference—if performed as a lawyer—two hundred and fifty dollars would have been a reasonable charge. But, rendered as a Register, they amount —as the fee-bill stands to-day (they must be taxed according to the fee-bill as it stands at the hour of taxation)—to about the sum of forty-six dollars and seventy cents, exclusive of the additional fees that have been incurred by these subsequent proceedings. As the fee-bill stood at the time of the presentation of the bill, they would have taxed at a higher sum, as the services were done under an order of reference, and therefore the provision of the Act of June 22, reducing the fees to one-half, would not have applied.

It appears pretty clearly from the papers that were the District Judge to countersign the check all compensation for my services would be lost. The attorney in his affidavit says that when he learnt that the Register had sent up the papers "this deponent then supposed that said Register had abandoned his claim for fees in this matter." This language does not leave it open to the inference that he refused to accept such supposed abandonment, and his subsequent conduct would indicate that he still deemed the claim abandoned, and had no intention of ever paying the same.

As to the allegation that "no certificate as to the issues raised before him in respect to his charges for services" was sent up with the certificate and opinion, so as aforesaid sent up, I certify that at the time I sent up such certificate, no issues, verbal or written, had ever been made, framed, or submitted to me, nor had any objection to my bill for services been pointed out, or suggested, to my knowledge, nor has anything of the kind been since done, unless there was something in the papers subsequently handed to me, and which were returned by me as above stated, which would bear such an interpretation. I did not examine these papers, as I had no occasion to do so—the papers upon the reference having before that time gone up. Nor has any fee or security been

tendered or offered to me except the sum of fifty cents sent to me by the office boy, whom I suppose to be one of the affiants.

These are the reasons which I submit to the District Judge in answer to the inquiry indorsed upon said affidavits.

I wish here and at all times to record my protest against the practice adopted in this case. I deny the right of any one to file a libel against me in the District Court—except upon the admiralty side of it. The holding of this office cannot deprive me of the right every citizen has of protecting his personal character, if not otherwise, at least, by the verdict of a jury. We have the authority of the Chief Justice of the Court of Appeals, that there are a class of lawyers who invariably malign the judge that decides a case against them. Had my opinion been favorable to the creditor, is there any doubt that my fees would have been promptly paid? Does any man believe that in that case any malversation in office would have been suggested? As it is, the attorney may place upon the lasting records of the court a malignant libel which must there remain for any unfriendly eye in all coming time to feast upon, and for the sharp grief of those who shall hereafter "speak with the enemies in the gate." Anything may be written—only pen, paper, and ink, are required. They who would make such papers enduring public records, approach the files of the court with velvet tread. Their footsteps are unheard. Truly: *Ibant sola sub nocte per umbram.* I cannot think that the public interest requires that any office, however humble, which has the high sanction of law, should be so exposed that no honorable man can fill it. I know that I could not keep a clerk—who should be worthy of the place—if I were to permit him to be thus exposed. I recognize the right of every lawyer to review my official acts, and to file charges against me by way of impeachment; but beyond this he has no *privilege.* When he reviews me he is bound to do so as respectfully as if he were seeking to review a Justice of the Peace upon *certiorari*—or the order of a Judge at Chambers. In such cases it is the immemorial

usage of the court of review to order all impertinent and scandalous matter, reflecting upon the officer whose acts are sought to be reviewed, to be stricken out before the court will proceed to hear the case on its merits. The court have in many instances refused to review an order or judgment until all personal matters are expunged from the brief of counsel. This practice has been thought necessary in order to maintain the honor and dignity of the courts, and to prevent such minor offices from falling so into contempt that honorable men will not hold them. If the District Judge countersign the check, he will do so because the law requires it—and the law requires it as much if the Register has acted mistakenly, as if he has acted corruptly. The affiant closes his affidavit with this charge: "And this deponent believes that in consequence of his refusal to pay the illegal fees demanded by said Register, said Register is determined to hinder and delay this deponent by every possible means from obtaining for the petitioner the money which this court has ordered to be paid him." These words add nothing to the *facts* of his case. He swears that the fees demanded are *illegal*. This is swearing to the law, not to a fact. I differ from him in this respect. He sets forth nothing from which this court could adjudge them illegal. This attack upon a Register is as truly a contempt of court, as if it were made against a judge "holding the Chambers of the court." I ask the court to deal with that charge as for a contempt. It is better that this court should deal with it as for a contempt, than that some other court should deal with it as a libel. The law punishes libel by indictment in the interest of the public peace. The government takes the weapon from the hands of every man, and says, "The government—through their courts—will protect you." But if the courts will not protect, then the government surrenders back the weapon. There is no human law that commands me to be charged of record with official corruption and perjury, without redress. These are not the words of a merely sensitive man. I speak in the interest of two hundred and fifty Registers—and not alone in their interest. I know that

there is nothing, even in these degenerate times, more injurious to society, to government, and to civilization than such efforts to degrade judicial functions. That these functions are humble—only *quasi* judicial—is not even a palliation of the wrong, but rather an aggravation.

If the charge here made were ever so true it does not help the case of the affiant. It is in no way necessary to his case. It does not tend in the remotest degree to help it. My motives may be material upon an official impeachment, but upon a simple review of my acts or omissions they are in no sense material. The court will reverse a judgment or an act as quickly, if done from the purest, as if done from the wickedest motives. I do not characterize the affidavit in this official certificate. To do so would be in some degree to recognize the right to make the charge. Were it ever so true, it would be equally unjustifiable, as the court is not asked to try me for an offense, but only to countersign a check. Neither my moral character, nor the moral character of my acts, can have the slightest effect upon the duty of the District Judge, as to such countersigning the check in question. I had intended to append hereto the affidavit of my managing clerk, who is fully conversant with all the matters alluded to in the affidavits. But on reflection I think such an affidavit would not be within the privilege accorded by law to judicial proceedings, and forbear to do so.

I ask this court, in justice to the public—in the interests of the administration of our bankruptcy system, and in justice to itself and to me, to deal with the attorney as for a contempt. On such a proceeding I may without impropriety submit the affidavits of those persons in my office who have been eye and ear witnesses of the matters referred to.

Respectfully submitted,

I. T. WILLIAMS,
Register in Bankruptcy.

[NOTE—The publication of the above opinion has been delayed for some time to await the action of the judge, but the check has not yet been countersigned.]

UNITED STATES CIRCUIT COURT—LOUISIANA.

In a proceeding to set aside a discharge, a creditor cannot rely upon testimony known to him before the granting of the discharge.
The dying declarations of a fraudulent grantee are not admissible against the bankrupt.
The alleged conspiracy must be established before the declarations of one conspirator are admissible against a co-conspirator.

In re A. P. MARIONNEAUX.

THIS was a petition filed in the District Court by certain creditors of A. P. Marionneaux, a bankrupt, to annul his discharge, on the ground that it was fraudulently obtained.

Mr. Chas. E. Fenner, for petitioners.

Messrs. E. C. Billings & A. de B. Hughes, for bankrupt.

WOODS, J.—The petition alleges in substance that the order of discharge was granted on February 24, 1869; that the bankrupt fraudulently concealed and failed to surrender for the benefit of his creditors a certain judgment in the case of *John L. Pointer* v. *The Mutual Insurance Company*, rendered in the Sixth District Court of New Orleans parish. That said judgment was really the property of the bankrupt, but the consideration on which it was founded was fraudulently conveyed to Pointer; that for the purpose of giving value to the transfer, Marionneaux took from Pointer a note or notes, which he held prior to and at the time of the adjudication in bankruptcy, and that he neither surrendered the property in the judgment, nor the notes.

That the petitioners have long suspected and believed the said facts to be true; they were always stoutly denied by Marionneaux and by Pointer, and petitioners had no knowledge of the same until after the discharge of Marionneaux, when, from the dying declarations of Pointer, who died on February 20, 1869, and certain provisions in his will, they did ascertain that the facts in reference to said judgment were as stated by them in their petition.

I have been unable to determine how this case comes into

this court. It is called an appeal, but there is no testimony submitted to the court, and the agreed statement of facts does not cover all the questions of fact in dispute in the court below. There are two bills of exceptions incorporated in the record, which would indicate that the case is here on error, but there is no writ of error, assignment of error, prayer of reversal, or joinder in error.

If the case is considered as an appeal, it is sufficient to say that there is no testimony whatever submitted to the court, and the agreed facts do not prove or tend to prove that the discharge in bankruptcy of Marionneaux was fraudulently obtained. On the contrary, the agreed facts do not touch that question at all. This court cannot, of course, say that the discharge ought to be set aside for fraud, when there is no testimony whatever showing fraud.

Regarding the case as here upon error, we might affirm the judgment of the court below, because no errors are assigned.

I have, however, looked into the record to ascertain whether the court below fell into any error for which its judgment should be reversed.

I think it very clear that if the petitioning creditors relied solely upon testimony to prove that Marionneaux obtained his discharge by fraud, which was known to them before the discharge, and which in fact they had used in a judicial proceeding to establish the identical act of fraud set up in this petition, they have no standing in court. If we look into the record we find that they did rely on other testimony, namely, the dying declarations of Pointer, and certain provisions in his will which could be considered as nothing more than dying declarations reduced to writing.

It is a well-settled rule of evidence that dying declarations are admissible only in criminal cases, and when the death of the deceased is the subject of the change, and the circumstances of the death are the subject of the dying declarations. (*Rex* v. *Mead*, 2 B. & C., 605; 1 Greenl. Ev., Section 156.)

As dying declarations, the statements of Pointer were clearly inadmissible. Nor could they be admitted as the declarations of one of two conspirators, for to make such proof competent, it must be preceded by proof of the conspiracy. (1 Greenleaf's Ev., Section 111.) They cannot be given as a part of the *res gestæ*, for the declarations were long subsequent to the transactions to which they relate. (*Rawson* v. *Haigh*, 2 Bing., 99, 104; 9 Eng. Com. Law, 335; *Marsh* v. *Davis*, 24 Vt., 363; *New Milford* v. *Sherman*, 21 Conn., 101; *Johnson* v. *Sherwin*, 69 Mass., 374.)

This additional proof, then, on which petitioning creditors relied, was the merest hearsay evidence, and not admissible; and, in fact, was no evidence at all. This testimony, when offered, would have been properly excluded, and that would have left the petitioning creditors to rely solely on facts which were well known to them long before the discharge of Marionneaux, to prove fraud in obtaining his discharge.

So that, even if the court below erred in its rulings, it did not err to the damage of petitioning creditors. They had no case, and could not by any possibility have succeeded, had the rulings of the court been in their favor upon all the points reviewed.

In their petition they set out the nature of the new evidence that they have discovered since the discharge of Marionneaux. It is the dying declarations of Pointer. The record shows that they had no case, and that their petition should have been dismissed.

A writ of error brings up the whole record, and the plaintiff in error may take advantage of a fatal defect in the declaration. (*Bank* v. *Smith*, 11 Wheat., 171.)

There is no error in this record for which the judgment should be reversed.

UNITED STATES DISTRICT COURT—MINNESOTA.

A preferred creditor cannot prove his debt after the assignee has obtained a judgment against him setting aside the preference.

In re CRAMER.

KIEFER & HECK, creditors of the bankrupt, made a settlement with him just previous to his bankruptcy, and received in full credit for their account certain merchandise and notes.

The assignee in bankruptcy demanded the property from Kiefer & Heck, and upon a refusal to deliver commenced a suit against them, alleging a fraudulent conveyance and preference, contrary to the terms of the Bankrupt Act.

Upon a trial before a jury, the assignee recovered a judgment. Kiefer & Heck now seek to prove their claim before the Register. Objection is made by the assignee, and the matter comes before the court for settlement.

J. B. & W. H. Sanborn, for claimant.

Rogers & Rogers, for assignee.

NELSON, J.—Section 5021 of the Revised Statutes authorizes the recovery by the assignee of all property received by a person having reasonable cause to believe that a debtor was insolvent, and knowing that a fraud on the Bankrupt Act was intended.

Section 5128 defines the fraudulent preferences forbidden by the act; and Section 5084 declares under what circumstances and when a creditor who has received a fraudulent preference may prove the claim on account of which the preference is made or given.

The latter section forbids proof of a claim on account of which a preference is given until the creditor first surrenders to the assignee all property or advantage received under such preference.

I think, in the light of these sections, inasmuch as judgment has been entered in favor of the assignee, in the suit brought against Kiefer & Heck, and the fraudulent preference clearly established, they are debarred from proving their

claim. The assignee has been compelled to seek the aid of the court to recover the advantage sought to be obtained by these creditors; they contested his right to recover, and being defeated have constructively made themselves a party to the fraud, and the *locus pœnitentiæ* has passed; the payment of the judgment is not a compliance with the terms of Section 5084.

Although, in case of actual fraud a preferred creditor might prove for a moiety, he can do so only when he has fulfilled the requirements of Section 5084, and made a surrender of the advantage obtained by the preference. In this case there is no actual fraud, and if these claimants had surrendered their advantage before suit, and perhaps before judgment, proof would have been allowed of their whole debt.

The right of these creditors to prove a claim represented by a note for seventy-six dollars is not seriously contested. The objection of the assignee is sustained, except to that extent.

Ordered accordingly.

UNITED STATES SUPREME COURT.

An order of the District Court, directing the payment of the balance due on subscriptions, is conclusive as to the right of the assignee to bring suit therefor.

It is not necessary that the stockholders shall be before the court when an order is made directing the payment of the balance due on subscriptions.

A stockholder cannot, in a collateral action, question the validity of an order directing the payment of the balance due on subscriptions.

The District Court may direct the payment of the balance due on subscriptions, although the balance on the certificate of stock is made subject to the call of the directors, under the instructions of the stockholders.

The assignee of a bankrupt corporation may sue at law to recover the balance due on a subscription for stock.

A party who pays for stock in part and receives a certificate in blank therefor is liable for the balance due thereon.

MARY E. SANGER v. *CHARLES W. UPTON, Assignee.*

Boutell & Waterman, for assignee.

Monroe & Bisbee, and *Att'y-Gen. Williams*, for defendants.

SWAYNE, J.—Several errors are assigned and relied upon

touching the admission of evidence and the instructions given to the jury.

We shall give our views of the case as it is presented in the record, so as to meet these objections without adverting specifically to any of them.

The original charter of the Great Western Insurance Company fixed its capital at one hundred thousand dollars. By an amendment of the charter the capital was increased to five million dollars. It became insolvent. A petition was filed against it in the District Court of the United States for the Northern District of Illinois, and on the 6th of February, 1872, it was adjudged a bankrupt. On the 11th of April, 1872, the defendant in error was appointed its assignee in bankruptcy. Upon the application of the assignee, the District Court made an order that the balance unpaid upon the stock held by the several stockholders should be paid to the assignee on or before the 15th day of August, 1872; that notice of the order should be given by publication in a newspaper or otherwise, and that in default of payment the assignee should proceed to collect the amount due from each delinquent. The assignee gave notice by publishing the order accordingly, and by mailing a copy, with a demand of payment, to each stockholder. The plaintiff in error was so notified. It was claimed that she was the owner of ten thousand dollars of the stock, upon which it was alleged there was due sixty per cent. The original charter required the payment of five per cent. of the capital stock, and that the balance should be secured in the manner prescribed. The amended charter is silent upon the subject. The stock certificates issued by the company set forth that twenty per cent. was to be paid in four quarterly installments of five per cent. each, "the balance being subject to the call of the directors, as they may be instructed by the majority of the stockholders represented at any regular meeting."

This was a regulation of the company, and not a requirement of either the original or amended charter. It did not

appear that any call was ever made by the directors or authorized by the stockholders.

The plaintiff in error having failed to pay pursuant to the order of the court, this suit was instituted by the assignee.

The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the District Court by the Bankrupt Act (Rev. Stat. U. S., Section 4972) to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree, and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either except by a separate and direct proceeding had for that purpose. She might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard, but it does not appear that any such application was made. As a stockholder she was an integral part of the corporation. In the view of the law she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. (*Hall* v. *U. S. Ins. Co.*, 5 Gill., 484; *Sagory* v. *Dubois*, 3 Sandf. Ch., 466, 510.)

This court has applied the same rule to an order by the comptroller of the currency, under the 50th Section of the National Bank Act, appointing a receiver, and directing him to proceed to make collections from the stockholders of an insolvent bank. (*Kennedy* v. *Gibson and others*, 8 Wall., 498.)

In that case it was said: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and if a part, how much, should be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. Its validity is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him."

This principle was applied also in *Cadle, receiver*, v. *Baker & Co.*, 20 Wall., 650.

It was competent for the court to order payment of the stock, as the directors, under the instruction of a majority of the stockholders, might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been. It may, perhaps, be well doubted whether the stockholders would have voluntarily imposed such a burden upon themselves. The law does not permit the rights of creditors to be subjected to such a test. It would be contrary to the plainest principles of reason and justice to make payment by the debtor for such a purpose in any wise dependent upon his own choice. A court of equity has often made and enforced the requisite order in such cases. The Bankrupt Court possessed the same power in the case in hand. The order rests upon a solid foundation of reason and authority. (*Ward* v. *The Griswold Manufac. Company*, 16 Conn., 593; *Adler* v. *The Mil. Pat. Brick Man. Co. et al.*, 13 Wis., 57; *Sagory* v. *Dubois*, 3 Sandf. Ch., 466; *Man* v. *Pentz*, 2 Id., 257.)

A resolution or agreement, that no further call shall be made, is void as to creditors. (3 Sandf. Ch., *sup.*) An agreement that a stockholder may pay in any other medium than money is also void, as a fraud upon the other stockholders, and upon creditors as well. (*Henry et al.* v. *Vermillion & A. R. R. Co.*, 17 Ohio, 187.) The owner of stock cannot escape liability by taking it in the name of his infant children. (*Roman* v. *Fry*, 5 J. J. Marshall, 634.) Nor is it any

defense to show that the holder took and held the stock as the agent of the corporation, to sell for its benefit. (*Allibone* v. *Hager*, 46 Pa. St., 48.)

The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to company. As regards creditors there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation. (*Curran* v. *Arkansas*, 15 How., 304; *Wood* v. *Dummer*, 3 Mason, 308; *Slee* v. *Bloom*, 19 Johns., 456, 474; *Briggs* v. *Penniman*, 8 Cow., 387; *Society, &c.*, v. *Abbot*, 2 Beav., 559; *Walworth* v. *Holt*, 4 Myl. & Craig, 619; *Ward* v. *Griswoldville Man. Co.*, 16 Conn., 593; *Fowler* v. *Robinson*, 31 Me., 189; Angel & A. on Cor., Section 600, and *post*; *Petrie* v. *Wright*, 14 Miss., 647; *Nevitt* v. *Bk. Port Gibson*, 14 Miss., 513; *Nathan* v. *Whitelock*, 3 Edw. Ch., 215; 4 *Amer. Law Mag.*, 93.)

The earliest authority upon the point under consideration is *Dr. Salmon* v. *The Hamborough Company*, decided in 1670, 1 Cases in Chancery, 204; 6 Viner's Abridg., 310, 311. The bill in that case alleged that Salmon held a bond of the company of eighteen hundred pounds, given to him for lent money. The company was incorporated, and had power to assess

rates upon cloths, in which it dealt, "and by poll on every member, to defray the charges of the company." The company had imposed rates accordingly, to wit: "four shillings and six-pence upon every white cloth exported, and divers others, and thereby raised eight thousand pounds per annum," etc.

"And the bill did charge, that the company, having no common stock, the plaintiff had no remedy at law for his debt, but did charge that their usage had been to make taxes, and levy actions upon the members and their goods, to bear the charge of their company to pay their debts, and did complain that they now did refuse to execute that power, and did particularly complain against divers of the members by name, that they did refuse to meet and lay taxes, and that they did pretend want of power by their charter to lay such taxes; whereas, they had formerly exercised power, and thereby gained credit; whereupon, the plaintiff lent them two thousand pounds, which was for the use and support of the company's charge, and so ought to be made good by them, and so prayed to be relieved."

The company, though served with a process, failed to appear. "But divers particular members being served in their natural capacities, did appear and demur for that they were not in that capacity liable to the plaintiff's demand." The Lord Chancellor sustained the demurrer and as to them dismissed the bill. The case was taken by appeal to the House of Lords. There the decree of the Chancellor was reversed, and the case was remanded to his court with directions to cause the officers of the company "to make such *leviation* upon every member of said company who is contributory to the public charge, as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in this cause, and to collect and levy the same, and to pay it over to the plaintiff as the court shall direct." Ample provision was made in the decree for the enforcement of this order. (See, also, *Curson* v. *The African Co.*, decided in 1682, 1 Vern., 121.)

By the deed of assignment, all the property and effects of every kind which belonged to the company when the petition

to have it declared a bankrupt was filed, passed to the assignee. (Rev. Stat. U. S., Section 5044; Bump on Bankruptcy, 473, 478.) He was clothed with the power and duty to sue whenever suit was necessary. The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have had "if the decree in bankruptcy had not been rendered and no assignment had been made." (Idem, Section 5047; Bump on Bank., 528.) The liability of the plaintiff in error, and the right and title of the company were legal in their character. If the company had sued it might have sued at law. The rights of the company passed to the assignee, and he also could enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. (*Hall* v. *U. S. Ins. Co.*, 5 Gill, 484.)

The assignee might have filed a bill in equity against all the delinquent shareholders jointly. (*Ogilvie et al.* v. *Knox Ins. Co. et al.*, 22 How., 380.) But if the company is utterly insolvent, in any event, a separate action at law in each case is much to be preferred. It is cheaper, more speedy, and more effectual. If the contingency should occur that the assets realized exceed the liabilities to be met, the District and Circuit Courts will see that no wrong is done to those adversely concerned. It is not to be doubted that this power will be exercised upon all proper occasions.

Upon the trial a large mass of testimony was given by the plaintiff, consisting of a prospectus and the original charter of the company, certified copies of the papers in the office of the Secretary of the State, touching the amendment to the charter, the deed of the Register to the assignee, the petition of the assignee, and order of the District Court relative to further stock payments, and proof of the publication of the order and of the sending of a copy of the order, with a demand of payment, to the defendant by mail. The admission of all this evidence was excepted to. Further testimony was given tending to prove that the defendant bought and re-

ceived from the company two stock certificates of five thousand dollars each, dated March 10, 1870, in the usual form, and in all respects complete, except that there was a blank for the name of the owner, which was not filled up.

And further: "That said defendant paid for said stock twenty per cent. of the par value of the same, paying part of said twenty per cent. in northwestern land scrip, and giving her notes for the balance of said twenty per cent., which notes were duly paid to said company, and that said stock stood in her name upon the books of said company, and that there was evidence introduced tending to show that she received a dividend from said company thereon.

"And that shortly after the fire of October 9, 1871, General Stewart, the president of the company, and brother of defendant, paid for her a call of twenty per cent. made upon said certificates of stock by the company, but that said defendant never authorized such payment, but repudiated the same, and that no more than forty per cent. had ever been paid on said stock.

"No evidence was introduced tending to show that said defendant ever subscribed for said certificates of stock or for any stock of said company, or that her name appeared on any list of stock-holders of said stock circulated by said company.

"No other express contract was shown to have been made between said company and defendant."

The court charged the jury, in effect, that if they believed the testimony, the defendant was liable. The charge was excepted to by the defendant. It was clearly correct. The only question was whether she owned the stock. No one else claimed it. The certificates were issued and delivered to her. They belonged to her. They were the muniment of her title. She could have filled the blanks with her name whenever she thought proper. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed upon the stock list. These

facts were conclusive against her. She was estopped from denying her ownership. She could not assert her title if there were a profit, and deny it if there were a loss. The certificates showed the par of the stock and the amount to be paid. Upon receiving them the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. No special express agreement, written or oral, was necessary. The former was as obligatory as the latter could have been. It would be a mockery of justice to permit such an objection to prevail. (*Ellis* v. *Schomoeck and Thomas*, 5 Bing., 521; *Doubleday* v. *Musket et al.*, 7 *Id.*, 110; *Harvey et al.* v. *Kay*, 9 Barn. & Cress., 356; *Upton, Assignee*, v. *Tribilcock*, 13 N. B. R., 171.)

Where there are defects in the organization of a corporation which might be fatal upon a writ of *quo warranto*, a stockholder who has participated in its acts as a corporation *de facto* is estopped to deny its rightful existence. (*Eaton et al.* v. *Aspinwall*, 19 N. Y., 119; *Abbot* v. *Aspinwall*, 26 Barb., 202.)

Where a party executes a deed poll reserving rent, and the grantee enters into possession, he is under the same liability to pay such rent as if the deed were an indenture *inter partes*, and he had executed it. The law implies a promise to pay which may be enforced by an action of indebitatus assumpsit. (*Goodwin et al.* v. *Gilbert et al.*, 9 Mass., 510.) It has been held frequently in cases of this class, where the instrument was under seal and executed by only one of the parties, that the covenant would lie against the other. (*Finley* v. *Simpson*, 22 N. J., 311.)

We find no error in the record, and the judgment is affirmed.

UNITED STATES CIRCUIT COURT—LOUISIANA.

A bond filed by a claimant to obtain a delivery of property to him, is not a debt created by fraud, although he subsequently endeavored to sustain his case by false testimony.

A bond to return property if the decision in a case requires it, is not a provable debt if the decision is not rendered until after the final dividend.

If there is no evidence when the final dividend was made, no claims can be deemed provable except those which are liquidated and fixed at the time of the adjudication of bankruptcy.

A discharge does not release a bankrupt from debts due to the United States.

UNITED STATES v. *ROB ROY AND CARGO.*

In this case a decree had been rendered in favor of the government upon the libel, and the court was called on to pronounce judgment against the claimant and his sureties upon the bond executed by them for the re-delivery of the property seized, to the United States. Upon this branch of the case several questions were raised, which were disposed of in the following opinion.

Messrs. A. B. Long, U. S. Attorney, and *J. S. Whitaker*, for the United States.

Mr. J. A. Campbell, for the respondents.

Bradley, J.—In this case a decree has been rendered on the merits in favor of the United States, and judgment has been entered against the sureties for the several sums in which, by way of penalty, they were bound for the safe return by the claimant of the cotton which was delivered to him. The true amount due, and the true amount to be paid by each surety, will have to be ascertained by testimony as to the value of the cotton at the time it was bonded and at any time since. Having been taken out of the possession of the government, the latter is entitled to such amount as could, at any time since the delivery, have been obtained for the same.

A question still remaining to be decided is, whether the

claimant, A. S. Mansfield, is or is not discharged from liability on the bond, by reason of his having received a discharge in bankruptcy. He has pleaded such discharge, dated June 30, 1869, purporting to be a discharge from all debts due by him which existed June 1, 1868, on which day the petition for his adjudication as a bankrupt was filed. The solution of this question depends upon that of one of two others.

First. Is the claim itself such an one as would be affected by a discharge in bankruptcy?

Second. If it is, will a discharge in bankruptcy bind the United States?

I. Under the first head, it is claimed on the part of the government that this is a debt created by *fraud*, and therefore not entitled to the benefit of a discharge under the Bankrupt Act. The government seized the steamer Rob Roy and her cargo as liable to forfeiture for acts done during the war. These acts were in violation of the rules of war, as adopted by the United States. The title of the government rested on such unlawful acts. The claimant, when the property was seized, came into court and undertook to defend the suit, and on giving a bond, which was then satisfactory, the property was delivered to him. Now, the appearance of the claimant in court, and his bonding the property, are the transactions on which the present claim is based. They cannot be regarded as fraudulent. Every person is entitled to come into the courts and prosecute and defend his suits in the ordinary way. The government proved the unlawful acts—the claimant failed to make good his defense. It is said that, in making his defense, the claimant used the evidence of false witnesses, and swore falsely himself. That, if true, was more than a fraud; it was a crime. But it is not a fraud by which this debt or obligation was created, and does not bring the case within that class of exceptions.

In the next place, it is insisted that the claim was not *provable* in the proceedings in bankruptcy, and therefore was not subject to discharge.

By the 34th Section of the Bankrupt Act it is enacted, that a discharge duly granted shall, with certain exceptions referred to, release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy. The 19th Section declares what debts and claims shall be thus provable. A careful examination of the debts and claims here described, will show that the claim in question was not one of them. To have been such, it must have been either—1st, a debt due and payable at the time of the adjudication of bankruptcy, or a debt then existing but not payable till a future day. It was neither of these. Or, 2d, a demand for goods wrongfully taken, converted, or withheld. It was not this. Or, 3d, a liability as drawer, indorser, surety, bail, or guarantor on a bill, bond, note, specialty, or contract, or debt of another person. It was not this. Or, 4th, a contingent debt, or contingent liability, where the contingency happens before the order for final dividend, or where the present value of the debt or liability can be ascertained and liquidated. The contingency on which the liability in this case was depending, was the final decision of the case, which could not be known, anticipated, or valued by any method of discount, or any calculation of probabilities or chances whatever. That decision was not made till the present term of the court. It is not shown when the final dividend of Mansfield's estate in bankruptcy was made; and consequently we can recognize its operation only upon claims which had become liquidated or fixed at the time of the adjudication of bankruptcy. The residue of the section is regulative of the claims already described; and it closes with the declaration, that no debts other than those thus specified shall be proved or allowed against the estate.

II. This decides the case, without making it necessary to examine the other question, whether the United States is affected by the discharge of its debtor in bankruptcy. On this point, the case of *United States* v. *Davis*, in 3 McLean, 484, is undoubtedly a precedent in favor of the validity and opera-

tion of a discharge, as against a debt due the government, being founded on a Bankrupt Act similar on this point to the present act. Were it not for that precedent, we should not hesitate to take a different view. There is nothing in the act itself which necessarily implies that a discharge under it was intended to operate upon claims of the government. The 33d Section, which declares that no debt created by the fraud or embezzlement of the bankrupt, *or by his defalcation as a public officer*, or while acting in a fiduciary capacity, shall be discharged under the act, is not sufficient to raise an implication that debts due to government, other than those which arise by defalcation as a public officer, will be discharged. There are public officers of the several States, as well as public officers of the United States; and they are undoubtedly included in this phrase.

Neither does the proviso at the end of the 28th Section raise any such implication: "That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State." This proviso has the effect of preventing the assignee from interfering with the process of collecting such taxes. He cannot take the property out of the hands of the tax collector, or other tax officer, and cause them to wait till he is ready to pay over the taxes. He cannot interfere with them in any way. Other claims of the government are to be paid by the assignee out of the proceeds of the property, before he attempts to make any dividend to the creditors. Taxes are to be collected by the tax officers themselves. We do not think that either of these provisions affects the question before us.

The general rule is, that the government is not bound by any law which would affect its rights, unless specially mentioned therein. This rule is so imperative as not to be displaced, we think, by any such ambiguous expressions as those which are relied on.

The point, so far as we are aware, having never been decided by the Supreme Court, we do not feel bound by the

decision in 3 McLean, *supra*, but are of opinion that the Federal government is not bound by a discharge under the Bankrupt Act.

The plea of bankruptcy is overruled, and judgment will be entered against Mansfield for the entire amount found to be due.

[NOTE.—Since this case was decided, the United States Supreme Court has held that a discharge in bankruptcy does not discharge debts due the United States. See *United States* v. *Herron*, 20 Wall., 251.]

UNITED STATES DISTRICT COURT—MAINE.

Where it appears that creditors have taken the real estate of the bankrupts by levy or execution prior to the filing of the petition in bankruptcy, and under attachments valid as against the assignee, and the collector of taxes makes proof against the bankrupt estate, for taxes due on such real estate, *Held*, That it would be inequitable to allow the attaching creditors to escape the burden of the taxes on the estate they have acquired under their levy, if the taxes were at the time of the levy allowed and deducted from the valuation made by the appraisers.

JEREMIAH FOSTER et al., Assignees of E. LONGFELLOW & SON, Bankrupts, v. *WILLIAM INGLEE, Collector of Taxes.*

INGLEE, the collector of taxes, having made his proof of taxes assessed on the real estate of the bankrupts, prior to the commencement of the proceedings in bankruptcy, asked for an order for their payment by the assignees; thereupon the assignees applied to the Register for a re-examination of the proof.

The facts are sufficiently stated in the opinion of the court.

H. L. Mitchell, Esq., for assignees.

John F. Lynch, Esq., for deposing creditor.

FOX, J.—State taxes duly assessed have a preference over general creditors under the Bankrupt Act; but under the

laws of Maine a lien is created for taxes on real estate. This estate has been taken by creditors under attachments valid as against the assignees, and it would be inequitable to allow these creditors to escape the burden of the taxes on the estate they have acquired under their levy, if the taxes were at the time of the levy allowed and deducted from the valuation made by the appraisers. The proof is therefore suspended to ascertain that fact. If the creditors had them deducted from the value at the time of appraisal, the collector should in equity be required to assert his lien therefor against the estate levied upon. If they were not deducted and allowed, then the taxes should be proved as a preferred claim against the estate.

UNITED STATES DISTRICT COURT—MAINE.

If an indorsement on the back of a mortgage, to the effect that it shall cover property acquired after its execution, is made for the purpose of defrauding creditors, the indorsement is void, but does not in any manner affect the validity of the mortgage.

Where the evidence merely shows that the parties endeavored to obtain all the advantage that the law would afford them, there is no such collusion as will deprive them of rights to which they would otherwise be entitled.

If an attaching creditor under the provisions of the State law pays off a mortgage, he will, upon the dissolution of the attachment by bankruptcy, be entitled to repayment out of the proceeds in the hands of the assignee, resulting from a sale of the property.

Where a party is compelled to pay the debt of a bankrupt in order to protect his own rights, he is entitled to be subrogated to the rights of the creditor as a matter of course, without any agreement to that effect.

MARSHALL WHITHED, and A. F. EMERY, Petitioners, v. *E. F. PILLSBURY and SAMUEL TITCOMB, Assignees.*

W. P. Whitehouse, for petitioners.
Pillsbury and Titcomb, pro se.

Fox, J.—Baker was adjudged bankrupt in this court upon his petition filed Sept. 20, 1875, and the respondents were duly appointed his assignees. The bankrupt was the keeper of the Augusta House, under a lease to him from Cushman and others for three years, from October 15, 1874, at a rent of three thousand two hundred dollars per year, payable in monthly installments, together with the taxes and insurance. The performance of the covenants of this lease were secured by a chattel mortgage to the lessors from Baker, of all the household furniture in the house, "together with all property of a similar description which he may hereafter add thereto, so that the said property should at all times be suitable and proper for carrying on said Augusta House;" the mortgage also provided "that said Baker should indemnify and save harmless the lessors from all liabilities they have already or may hereafter incur, by reason of advances made by them, or as signers or indorsers of any notes which they.

should make or indorse for the accommodation of said Baker." This lease and mortgage were duly recorded, and the bankrupt went into possession of the house, and remained there until the filing of his petition in bankruptcy. He added to the furniture, his purchases amounting to about four thousand dollars, a portion of which was attached on a writ in favor of the Gas Company, July 31, 1875. This attachment was discharged, and on August 5th, Baker executed on the back of the original mortgage an agreement reciting "that in consideration of the depreciation in value, by use, past and future, of the property within described, I hereby agree that the within mortgage, with this indorsement thereon, shall hold and cover any and all additions that have been or may be made to the same; also including two billiard and one pool table put into the Augusta House by me, together with all the fixtures thereto belonging."

This instrument was recorded in the city records on the same day.

Under the laws of this State, an attachment of chattels, subject to a mortgage, may be made on *mesne process*. Chap. 18, Sections 41, 42, 43, and 44, provide that such mortgaged property may be attached, held, and sold, as if it was unincumbered, if the attaching creditor first tenders or pays the full amount unpaid on the demand so secured. The mortgagee shall not bring his action against the attaching officer until he has given him forty-eight hours' written notice of his claim and the true amount thereof; and the officer or creditor may within that time discharge the claim by paying or tendering the amount due thereon, or restore the property. "If the creditor redeems such property and it is subsequently sold by the officer, he shall from the proceeds first pay to the creditor the amount, with interest, paid by him to redeem, and apply the balance to the debt on which it was attached."

The petitioners, being creditors of the bankrupt, on the 18th of August sued out their writs against him and caused the mortgaged furniture to be attached thereon by the Sheriff of Kennebec county, and on the same day due notice of the

attachment was given by the officer to the mortgagees, to which, on the 27th of the same month, they made written reply, setting forth in detail the several sums claimed by them to be secured by said mortgage, amounting in the aggregate to five thousand nine hundred and three dollars and seventy two cents on that day; and they further claimed to hold the same as security for the accruing rent during the continuance of the lease.

On the 27th of August, the mortgagees served upon Baker a notice of foreclosure under the statute, for breach of condition of the mortgage, and on the 28th the attaching creditors paid to the mortgagees the amount claimed by them to be secured by the mortgage—*i. e.*, five thousand nine hundred and three dollars and seventy-two cents, and also gave to them their obligation, binding themselves to assume and keep in the future all the other stipulations and covenants of said lessee, "provided said lessors shall promptly, and without delay, enforce compliance with all the terms and conditions of the lease not already performed by us, and avail themselves of all needed legal measures, or allow us to do so, to expel said lessee for non-payment of rent hereafter becoming due, and give us the privileges and benefit of said lease according to the terms thereof."

On the 6th of September, a process of forcible entry and detainer, to recover from Baker the possession of the premises, was commenced against him by the lessors, returnable before the Municipal Court of Augusta, September 13th.

An appraisal was duly made of the attached property, and the appraisers having certified that it could not be kept without great expense and deteriorating in value, the officer, in accordance with law, advertised to sell the same at public auction on the 23d day of September, but was prevented from so doing by an injunction from this court on the 22d of that month, in the bankruptcy proceedings; and the property was therefore held by the sheriff under his attachment until the respondents were appointed assignees, when the same was turned over to them by the sheriff. The process of for-

cible entry and detainer was also stayed by an injunction from this court on the 24th of September, until the further order of the court.

The assignees having obtained the possession of the mortgaged property, Whithed proposed to purchase the same, together with any interest acquired by the assignees in and by virtue of the lease, for the sum of ten thousand dollars. They petitioned this court for leave to accept the offer of Whithed. Notice of the petition was given to the mortgagees and all others interested, and no one appearing to object, the court authorized the sale to be made under Section 5063, Rev. Stat., which has been done.

Upon a careful revision of the accounts, it appeared that the bankrupt had paid to one of the lessors, Milliken, by board, seven hundred and eighty-six dollars and sixty-seven cents, which should have been allowed in part discharge of the rent; and that there had been an over-payment of rent by the attaching creditors to that amount, on the 27th day of August. A settlement was accordingly made between the lessors and the attaching creditors, the sum of four thousand nine hundred and nineteen dollars and eleven cents being claimed as due on the 27th of August, and a further sum of two hundred and thirteen dollars and thirty-three cents for additional rent of the premises from August 27th to September 20th, the day of the filing the petition in bankruptcy; these two amounts, in the aggregate five thousand one hundred and thirty-two dollars and forty-four cents, were retained by the lessors, and the balance of the amount received by them was repaid to the attaching creditors. The petitioners in their present petition now ask that the assignees may be ordered to refund to them, from the proceeds of sale, the five thousand one hundred and thirty-two dollars and forty-four cents and interest, they having relinquished to the assignees and discharged all claim, under the indorsement on the mortgage of August 5th, to any proceeds of sale of the furniture acquired by Baker after the 14th of October.

The respondents, in behalf of the creditors, deny the va-

lidity of the original mortgage of October 14th, and claim that it was rendered null and void by the proceedings of August 5th: and they called at the hearing the bankrupt as a witness, who testified "that soon after the attachment made by the Gas Co., Cushman, one of the mortgagees, called upon him (he being then unwell and confined to his room), with the mortgage and indorsement thereon, as it now appears, and requested him to execute the same; at the same time assigning as a reason therefor, that there were several parties in Augusta who were disposed to put him to trouble and expense, and subject them to a good deal of cost and inconvenience, "that it would be no harm to me, but on the contrary, a benefit to me if I signed the paper; and I then executed it."

It is claimed upon this statement, that one purpose of the mortgagees in thus procuring the indorsement and having the mortgage cover the subsequent acquired property of the mortgagor, was to delay other creditors and prevent their attachment of this property. The original mortgage provided "that all property of a similar description to that then on the premises, which the mortgagor should thereafter add thereto, should pass under the mortgage;" and a stipulation of this nature was held valid and effectual as against an assignee in bankruptcy under the former Bankrupt Law. (*Mitchell* v. *Winslow*, 2 Story, 630.) So that all of the subsequent acquired property of a similar description to the old, the mortgagees could have retained as against an assignee in bankruptcy. Cushman has not been called to contradict this statement of the bankrupt, and I am therefore for this hearing to consider it as established, that one motive and purpose of the mortgagees in procuring this indorsement was to delay creditors of the bankrupt, and that this transfer of the subsequent acquired property was fraudulent and could not prevail as against attaching creditors.

No rights, therefore, were acquired to the new property, and this indorsement was a nullity, so far as creditors were concerned—but that I hold is the extent of its operation. It

did not deprive the creditors of any rights whatever which they before had. The newly acquired property was still open to attachment for Baker's debts, but the property which belonged to Baker at the time the original mortgage was executed, did not become subject to such liability. That mortgage was originally valid and effectual, and so continued, notwithstanding the parties at a day long subsequently might have contemplated a fraudulent purpose relative to other property of the bankrupt, and to subject it to liability for the security of the same claims embraced in the original mortgage. The rights of all parties are the same as they would have been if, instead of making this indorsement on the back of the original mortgage, a separate, independent mortgage had been given on August 5, upon the subsequent acquired property, as security for the claims covered by the original mortgage, and the parties at the time had designed thereby to defeat or delay the other creditors,—it is quite clear that the latter mortgage would be fraudulent and void as against creditors and assignees in bankruptcy, but it is equally clear to my mind that it could not in any manner affect the prior mortgage untainted by any fraud in its inception.

In the present case the petitioners have filed a written waiver and release of all interest in and to any property not included in the original mortgage, the proceeds realized from the sale of that property being in excess of the amount paid by them to the mortgagees, so that no claim is made under the fraudulent indorsement.

It is further contended by the assignees, that there has been collusion between the petitioners and the owners of the Augusta House, to turn over all the personal property of the bankrupt to the petitioners, and that they might acquire a title thereto for a sum far below its real value, and in fraud of the other creditors. The history of the case certainly manifests that the owners of the property were quite willing to be rid of Baker as their tenant, and that the petitioners, or Whithed, might take possession in his stead and occupy

the house, and acquire all their rights to Baker's property, on complying with his obligations under the lease and mortgage. And to accomplish these ends there can be no question that the landlords resorted to a foreclosure of the mortgage, and their process of forcible entry and detainer, and the attaching creditors to the appraisal and contemplated sale by the sheriff of the property attached; but every step in those proceedings was in accordance with the laws of this State, while, to counteract their force and effect, the bankrupt and his creditors applied to this court, and availed themselves of its restraining process to prevent their opponents obtaining any advantage by their movements under the various provisions of the State laws. Each side, in my view, stood on their legal rights, endeavoring to obtain all the advantages that the law would afford them, and as it would now seem, the whole rather resulted in a drawn game, neither party having obtained any very great success over the other, the property of the bankrupt having vested in his assignees in substantially the same condition it would have done if this warfare had never existed. But nothing is shown which would justify this court in declaring that there was such collusion between the parties as should deprive the petitioners of any rights to which they would otherwise be entitled.

Having disposed of these objections, there remains to be determined what are the petitioners' rights in this fund, the proceeds of the mortgaged property sold by order of the court, and now in the custody of the court, as against the assignees in bankruptcy.

The petitioners made an attachment of this property to secure a just debt; this attachment was valid under the laws of this State, but liable to be defeated by proceedings in bankruptcy instituted within four months. The property thus attached was subject to a valid mortgage, and the laws of this State empowered the attaching creditors to pay the amount of this incumbrance and discharge the claim thereon, and if the creditor redeem the property and it is

subsequently sold by the officer, he shall from the proceeds first pay to the creditors the amount, with interest, paid by him to redeem the property. The officer, in strict compliance with the law, was about to sell this property and pay to the creditors the amount they had paid to redeem, when he was enjoined by this court from so doing, and was compelled to retain the property until assignees were appointed, and then to surrender it to them; and they have since, by order of this court, sold it for a sum in excess of the amount paid by the creditors to redeem it.

Under these circumstances which party has the better equity, the creditors who have paid this amount to discharge this valid claim, an incumbrance upon the property, and for which at present they are just so much the poorer, or the assignees, who by reason and on account of this very payment by these creditors, have received the property relieved and discharged from this incumbrance, and thereby the estate in bankruptcy is just so much the larger for distribution than it would have been if the creditors had not paid this sum?

The simple statement of the proposition presents most conclusively its own solution. Conceding that the payment of the amount "discharged" the incumbrance or "redeemed" the property, it is equally certain that the law itself, the instant the payment was made, the property being in the possession of the officer, imposed upon the property a new lien or incumbrance for the security of the creditors, for the amount paid by them to redeem. The officer constantly retained the property charged with this trust and statutory lien, until sold by him, and the proceeds he was required to pay over to the creditor to the extent he had paid out in redemption of the property. The lien, therefore, upon this property, for the security of the redemption creditor, was thus created by statute, and was as effectual and binding upon the property as could be had by the most formal contract. The statute provided its own method for its enforcement, and this would have proved effectual and sufficient if the Court in Bankruptcy had not interposed and prevented the officer from completing

the steps in that behalf which the State law contemplated as sufficient.

In *Savings Bank* v. *Stuyvesant Bank*, 10 N. B. R., 399, 405, Mr. Justice Hunt of the Supreme Court of the United States, says: "The soundness of the position that liens are preserved under the Bankrupt Act, and that the holders of them are to be protected, cannot be doubted."

"The Bankrupt Act of 1841, in its 2d Section, was very explicit on this subject, and it was repeatedly held *that liens or rights of property created by the laws of the State could not be disturbed while enforcing the provisions of the act.* The rule is the same under the present Bankrupt Law, and although not stated in terms so precise and specific as are found in the Act of 1841, the provisions of Sections 14 and 20 establish the same rule."

In Wynne, 4 N. B. R., 23, Chase, C. J., says: "We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed, subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had been filed." "Liens are of various descriptions, and may be enforced in different ways, but we think it sufficient to say here what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to receive the payment of this debt." In that case a statute of Virginia required an officer who took goods on certain premises under legal process to pay out of the proceeds the rent in arrear, and the Chief Justice remarks: "We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of high and peculiar character." While that language is peculiarly applicable to the present case, the lien in the present case is of a higher nature, as the party claiming it has discharged a prior lien upon the same property, for the exact amount which he now claims to be allowed, and all parties interested in the property have been benefited to the exact

amount claimed, as no one could have in any way recovered a dollar from the property without first discharging the incumbrance.

In 2 Story, 334, 345, *Parker* v. *Muggridge et al.*, Mr. Justice Story says: "The plaintiffs have an equitable lien and a superior title to the property, over the assignee and the general creditors, and the assignee must take the property of the bankrupt for the general creditors, subject to this lien and superior title, * * * and the property will be followed and affected with the trust, in the hands of the assignees, in the same manner and to the same extent as it would be in the hands of the bankrupt. We all know that in bankruptcy the assignee takes only such rights as the bankrupt himself had, and is subject to like equities."

This last proposition, with a modification repeatedly recognized by Judge Story himself, that in cases of fraud the assignee may acquire and enforce rights which the bankrupt could not, has been affirmed scores of times, by every tribunal in the United States administering the Bankrupt Law. If bankruptcy had not intervened, the bankrupt could not have prevented the creditors receiving the payment which they now claim, from the proceeds of the sale of the goods upon which they had a valid statute lien: charged with this lien those goods passed to the assignee, and the Bankrupt Court, administering principles of equity, is not restricted to the course provided by the statute for affording redress to these claimants. Having taken this property, burdened with this incumbrance, it is bound, on every principle of equity law, first to see that this lien is paid off and fully discharged before it will allow any portion of the proceeds of the property to be distributed among the general creditors.

It is said that this principle will not justify the payment of the two hundred and thirteen dollars and thirty-three cents, being for the rent from the 27th of August to the day of the filing the petition in bankruptcy; it is claimed that this sum was paid by force of the petitioners' obligation of August 27th, by which they, on certain conditions, became personally

accountable to the lessors for the subsequent rent. These conditions appear to have been complied with by the lessors, and I am of the opinion that the petitioners had rendered themselves personally accountable for the future rent; but I also hold that this remedy was merely cumulative, and that the lessors still held the security under their mortgage for its payment. They had done nothing at that time to discharge this security or to estop them from availing themselves of it in case it became necessary for their protection. They had received payment for rent up to the 27th of August, and had at the same time asserted, distinctly, their claim under the mortgage as security for future rent.

Between these dates, August 27th and September 20th, Baker was in possession of the premises, resisting the process of forcible entry and detainer instituted to oust him therefrom; his furniture was also there, subject to attachments for the benefit of the petitioners, who had at that time a much larger interest at stake in the same property, by reason of their lien on the same, for the amount paid by them to the lessors. They were therefore, as it were, compelled to discharge the claim for the subsequent rent, which was secured on the property, subject to their liens and attachment, as the claim for rent most certainly would have priority over the claim by attachment. The payment of the subsequently accruing rent was not strictly by force of the provisions of the law before cited, and it did not, therefore, strictly acquire for its security a lien as provided by statute, which would require the payment by the officer from the proceeds of sale; but its payment from these proceeds may, in my view, be justified, under the circumstances, as against the assignees of the bankrupt, by the principle of subrogation, which is frequently adopted by courts of equity. If the mortgage is to be deemed as now outstanding for the security of the payment of the rent, which under the circumstances may well admit of doubt, as the mortgagees upon notice have not objected to the sale of the mortgaged property, or to the granting of the prayer of the present petition, it is possible that the mortgagees might

interpose and object, and that as against them and their future claims under this mortgage, the petitioners could not insist on being subrogated to their rights *qua* the payment made by them for this subsequent rent: but I do not think the assignees in bankruptcy are at liberty to insist on this objection in behalf of general creditors. "It is a well-settled and familiar principle that he who acquires an interest in an estate that is subject to a mortgage or other charge, acquires at the same time the right to pay off such mortgage, or to exonerate the estate, in the same manner that he would have been entitled who created the incumbrance; and that in so doing he becomes substituted in the place of him to whom he has paid the money, in all cases in which it is necessary for his protection that the incumbrance should be kept alive, and he will, in all cases of making such payment be deemed the assignee, if an assignment will better subserve the ends of justice than payment and extinction would do." (*Fletcher* v. *Chase*, 16 N. H., 38, 42.)

"Where a party advancing money to pay the debt of a third person, is compelled to pay it to protect his own rights, a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect." (*Sanford* v. *McLean*, 3 Paige, 117, 122.)

For these reasons, I hold that as against the assignees these petitioners have a right to demand the payment of the two hundred and thirteen dollars and thirty-three cents from the sales of the mortgaged property, equally with the larger sum.

Finally, it is objected that these proceedings of the petitioners were in furtherance of an attachment which was an attempt to obtain a preference fraudulent under the Bankrupt Law. This objection at first appeared of some force, but on reflection I am satisfied it should not prevail. The Bankrupt Act in terms declares what are prohibited and fraudulent transfers and preferences, and denounces them under certain penalties, but an attachment, on mesne process, is nowhere enumerated among them. It does declare, that the assignment to the assignee shall vest in him the property of the

bankrupt, although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any such attachments made within four months next preceding the commencement of bankruptcy proceedings.

The attachment is nowhere declared to be a fraud upon the act; on the contrary, if permitted by the State law, it may be made and will continue in full force until the assignment; and only fails and dissolves away in case the assignment is made in proceedings commenced within the four months: in that case, the result will be, the party obtains no benefit from his attachment; he has incurred expenses incidental to it, for which he has no claim against the bankrupt or his estate; but any other rights, by virtue of the State law, which he has acquired in the property, still continue to him, and are not affected by the bankruptcy proceedings. An express provision should be had to defeat these rights, and none such is anywhere found in the act.

It results that the petitioners are entitled to payment of the full amount claimed by them, with interest from the date of such payments.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A partner who is brought into bankruptcy by his copartner must obtain the assent of the requisite proportion of the creditors or have assets to the required amount.

A proceeding in bankruptcy by one partner against his copartner is not an involuntary or compulsory proceeding.

In re W. F. WILSON.

W. F. WILSON was adjudged bankrupt upon the petition of one Harrington, alleging himself a partner with Wilson, and that the firm was insolvent. Wilson denied the partnership, and a jury trial was had which resulted in a verdict for the petitioner. Wilson in due time applied for his discharge, but filed no assent of creditors, and had not paid a sufficient divi-

dend to enable him to dispense with the assent, if any is required. A creditor objected on this ground, and alleged certain frauds besides.

E. Avery, for the bankrupt, cited Statutes 1874, Section 9; 18 Statutes, 180; *Re Penn*, 5 N. B. R., 30.

N. B. Bryant, for the creditor.

LOWELL, J.—An able argument has been addressed to me, that Section 9 of the new statute absolves the defendant from obtaining the assent of his creditors, on the ground that *as to him* the proceedings are compulsory.

It is true that this defendant did not consent to be adjudged bankrupt in connection with one whom he denied to be his copartner, and that Rule 18 requires in such cases notice and other proceedings, including jury trial, if demanded, precisely as if the petition were by creditors; and that the discharge of each partner is separate and distinct from that of any other.

Still I am of opinion that these are not involuntary or compulsory proceedings under Section 9 of the Act of 1874. That statute requires a considerable number of creditors to join in a petition, and, as has been pointed out by judge Blatchford, precisely the number required to assent to the discharge of a voluntary bankrupt; so that the theory of the statute appears to be that those creditors who have chosen to put a person into bankruptcy against his will, are presumed to assent to his discharge, if he has committed no actual fraud or misdemeanor against the meaning of the statutes. That presumed assent is not given where one partner petitions.

Again, creditors can only proceed for certain acts of bankruptcy; but a partner always petitions on the ground that the firm is insolvent. Rule 18, indeed, seems to imply that a partner may allege acts of bankruptcy against the firm; but the statute speaks only of insolvency; or rather, it says that partners may petition or be petitioned against like individuals, and an individual can only petition on the ground of his insolv-

ency. And I apprehend it would be very difficult to find any case in which a partner would not be estopped to petition for joint acts of bankruptcy. No such petition has ever been brought in this court.

If partners are insolvent, either has a right to insist that the firm shall go into voluntary bankruptcy, and the statute does not even say the other shall be notified. But the court, very wisely, has adopted it as a rule of practice, to prevent fraud and surprise. But if the insolvency is proved the case is made out. No involuntary case, of the ordinary kind, can be made out by such evidence. In truth, the verdict simply establishes that the recusant partner ought to have joined in the voluntary proceedings.

Then look at the consequences. One partner, disposed to do his whole duty by his creditors, brings the petition; the other resists it, and is rewarded by a free gift of his discharge. Or the partners put forward one to take the burden, and compensate him in some way for the risk. Or they take in a partner for the very purpose of playing this part.

It was argued that the words "compulsory" and "involuntary" describe two classes of cases, one by creditors and one by partners. But it is plain that the words are used throughout this statute as strict synonyms. See especially Section 6, where compulsory is evidently so used.

Upon the whole, I am satisfied that Section 9 refers to the ordinary case of petitions *in invitum*.

Another very serious objection to the discharge, I have not considered; but if this case should be taken to the Circuit Court, I wish it to be distinctly understood, that the allegation of fraud in large payments to the bankrupt's brother is not passed upon by me.

Discharge refused.

UNITED STATES CIRCUIT COURT—S. D. GEORGIA.

A mere omission of property from the schedules, is not of itself a ground for refusing a discharge.

Where property has been transferred, an omission to place it on the schedules is no ground for refusing a discharge, unless there was a design to conceal the property.

In re SMITH.

THIS was a petition of review, filed under the 2d Section of the Bankrupt Act, for the reversal of an order of the District Court.

Mr. H. R. Jackson, for petitioner.

Mr. F. S. Hesseltine, for respondent.

BRADLEY, J.—The petitioner asks for a reversal of the decree of discharge, because the District Court overruled and disregarded a report of the Register as to certain proceedings had before him, in which the creditor objected to the discharge, and desired a trial on the subject.

If a creditor objects to the discharge of a bankrupt, the 31st Section of the Bankrupt Act requires that he should file a specification in writing of the grounds of his opposition, and enacts that the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the court. The 24th General Order requires the creditor to file his specification of the grounds of his opposition, in writing, within ten days after the time for showing cause, and directs that the court shall thereupon make an order as to the entry of said case for trial, etc.

Supposing that the objections to the discharge in this case were properly filed, an examination of them, as certified by the Register, shows that they could not, if fully sustained, have prevented the bankrupt's discharge. The specification is, that the schedule filed by him did not contain a full and complete statement of the property owned by him at the time of filing his petition; the following items not being contained therein, to wit: one tract of land, etc., (describing it, together with other property also described).

An omission to include all his property in his schedule is not, of itself, cause for refusing a bankrupt his discharge. It must be done for the purpose of concealment, or to defraud, or to mislead. There must be false swearing, or some other of those delicts which are enumerated in the law as grounds for refusing a discharge. They are enumerated in the 29th Section of the Bankrupt Act. A mere omission of property is not one.

The parties have sent up to the court a statement of facts alleged on the one side and the other, in reference to the matter specified; but it does not aid the objection, but rather shows that the debtor had an excuse, if not an entire justification, for the omission. It seems that the property omitted was, in 1865, decreed to be conveyed to a trustee for the benefit of the bankrupt's wife. The creditor alleges that that decree was obtained by the procurement of the bankrupt, and was in fraud of creditors. It certainly could not have been procured in contemplation or in fraud of the Bankrupt Law, for it was rendered two years before the passage thereof. It raises an issue entirely distinct from and collateral to the issue in this case, and one that the assignee may well be justified in subjecting to a legal investigation. It is very possible that the assignee may recover the property, and employ it for the benefit of the creditors. But it must, at least, be conceded, that there was a plausible excuse for its omission from the schedule, and that a fraud in the procurement of that decree does not necessarily imply deceit in the omission of the property from the schedule. And as no perjury is charged against the bankrupt, nor any design to conceal the property, but the omission alone is relied on for preventing a discharge, I think the District Judge was justified in overruling the objection, and refusing an issue.

The decree is affirmed.

UNITED STATES CIRCUIT COURT—N. D. FLORIDA.

Property cannot be taken from the possession of a receiver appointed before the commencement of the proceedings in bankruptcy, in an action to foreclose a mortgage, without discharging the mortgage debt.

Where property is improperly taken from the possession of a receiver and sold under an order of the District Court, the Circuit Court, on reversing the proceeding, will set aside the sale, and direct the property to be surrendered to the receiver.

Where property is improperly taken from a receiver and sold under an order of the District Court, the purchase-money will be returned to the purchaser when the sale is set aside.

DAVIS et al., Trustees, v. *RAILROAD COMPANY et al.*

ON the 1st of June, 1867, Davis and Jandon, trustees of the first mortgage of the Alabama and Florida Railroad Company, filed a bill to foreclose the same in the Escambia County Court, of the State of Florida, which court, on the 11th day of July following, appointed Bushnell receiver, who took possession of the railroad and property mortgaged. Afterwards, on the 13th of July, 1867, the railroad company, by its officers, filed a petition in bankruptcy, and was declared bankrupt by the District Court of the United States for the Northern District of Florida, and Hall was appointed assignee in December. The District Court, on application of the assignee, ordered the mortgaged property to be taken out of the hands of the said receiver, and delivered to the assignee, which was done by the marshal of the United States, against the protest of the receiver. Afterwards, in February, 1868, the same court ordered the property to be sold as perishable property. The sale took place on the 25th of March, 1868, the trustees of the mortgage giving public notice that they claimed the proceedings to be illegal. William A. Richardson and others became the purchasers, and became organized under the name of the Pensacola and Louisville Railroad Company.

The trustees and their receiver then filed this petition for a revision of the proceedings of the District Court, and for setting aside the sale. The hearing was postponed from

time to time by arrangement, and finally on the 24th of April, 1871, Circuit Justice Bradley made a decree declaring:

First. That the mortgage was a first lien on the property and franchises described therein, and that the possession of the receiver under the order of Escambia County Court was a lawful possession at and before the commencement of proceedings in bankruptcy, of which it was not competent for the District Court in bankruptcy to deprive him.

Second. That the order requiring the receiver to surrender the property be set aside.

Third. That the question whether the sale in bankruptcy should be set aside, and what title, if any, the respondents acquired thereby, be reserved for further consideration; and the assignee was restrained from collecting the balance of the purchase-money.

This decree was made without prejudice to any equitable claim which the Pensacola and Louisville Railroad Company might have for reconstructing and furnishing the railroad, and without prejudice to the claim of the trustees for mesne profits.

The reserved questions were subsequently (in November, 1872) argued by *Messrs. Clarkson N. Potter* and *C. C. Yonge*, for the petitioners, and by *Mr. A. G. Thurman*, of Ohio, for the respondents.

The petitioners, amongst other things, insisted that the proceedings in bankruptcy were a nullity, because no officer of the company had been duly authorized by a vote of the majority of the corporators present at a legal meeting called for that purpose, to present any question for adjudication of bankruptcy. The facts bearing on this point are stated in the opinion.

BRADLEY, J.—The questions now to be disposed of are, first, whether the sale of the property made by the assignee was valid, notwithstanding the illegality of the order under which he acted; and second, what should be done with the proceeds of said sale.

The petitioners contend that the sale was void for two principal reasons; first, because the bankruptcy proceedings were void in their inception; and second, because the District Court had no authority to take the property out of the hands of the receiver appointed by the State court.

The first ground is based on the allegation that "no officer of the (bankrupt) company had been duly authorized by a vote of a majority of the corporators present at any legal meeting called for the purpose, to present any petition praying for such adjudication, as required by the Bankrupt Act." I do not attach any importance to the objection of the respondents that this question cannot be raised, because not passed upon by the District Court. It seems to me that the District Court could not make a decree of bankruptcy without passing upon it. It lay at the foundation of the proceedings, and the decision of the District Court on the point cannot properly be brought in question collaterally. However, having looked at the evidence in the case, I cannot see any good ground for the position. If any irregularity occurred in the call for the stockholders' meeting, by which the direction was given to institute the proceedings, it arose from the contumacy of certain directors who resigned their offices for the purpose of embarrassing the stockholders. The city of Pensacola owned more than five-sevenths of the stock of the company, and it is sufficiently clear that the city authorities took all practicable measures for having a fair stockholders' meeting and vote on the subject; and that the vote of the city was positive in favor of the bankruptcy proceedings, and of the instruction to the president of the railroad company to institute the same. I shall, therefore, assume that the proceedings in bankruptcy were regularly instituted.

The question then recurs, What authority had the Bankrupt Court to take the property in question out of the possession of the receiver appointed by the State court? The former order in this case, declaring the possession of the receiver lawful, and directing the property to be returned to

him, was based on the fundamental principle, that no proceeding in bankruptcy can deprive creditors of their just possession of property held as security for a debt, without discharging the debt. The possession of the receiver, under authority of the State court, in virtue of the first mortgage, was the possession of the mortgagees, and could not be interfered with without liquidating the debt. This point has been recently decided by the Supreme Court of the United States, in the case of *Marshall* v. *Knox*, 8 N. B. R., 97; 16 Wall., 551. The respondents insist that by the law of Florida, a mortgagee cannot take possession of the mortgaged premises until he has foreclosed the mortgage, and become the purchaser. Whilst this may be the general law of that State, so far as regards the legal right of entry, and the maintaining of ejectment on the mortgage alone, yet a court of equity, after proceedings have been instituted for the foreclosure of the mortgage, has an undoubted right to take possession of the premises for the preservation of the fund and the protection of the lien thereon. Besides which, the express covenants and stipulations in the mortgage given in this case, authorize the trustees to take possession or to have a receiver appointed within a certain time after default shall be made in the payment of interest or principal.

The rights which supervene upon a mortgage or other specific lien, accompanied with possession before proceedings in bankruptcy, are very different from those arising from proceedings in State courts in cases of general insolvency. A mere insolvent proceeding, or a proceeding of that nature, and possession of the bankrupt property taken in pursuance thereof, is antagonistical and repugnant to the Bankrupt Law, and will be avoided by regular proceedings in bankruptcy. But a proceeding to enforce a mortgage or other specific lien involves the right of property; and possession in pursuance thereof, legally or judicially, taken before proceedings in bankruptcy, cannot be interrupted by those proceedings. Hence, the action of the Bankrupt Court, in taking the prop-

erty in question out of the hands of the receiver, was regarded as unwarranted and illegal.

But the respondents' assignee contended that the sale should stand, although the order for sale was illegal. I do not think so in such a case as this. It is analogous to that of a sale by a sheriff on execution against A, of property belonging to B. The sale is void. The owner may recover his property of the purchaser. So may the trustees in this case. They ought not to be compelled to take the proceeds arising from the unlawful sale. Their rights might, in this way, be wholly sacrificed.

The respondents, however, insist that no motion was made before the District Court to set aside the sale by the assignee, and, therefore, the matter cannot be considered on this petition. But the sale was made in consequence of a special order of the District Court, and that order is brought directly in question. Satisfied that the order, and the sale made in pursuance of it, were both illegal, I can see no difficulty in decreeing them both to be void.

The question then arises as to the disposition to be made of the purchase-money paid or secured to be paid by the respondents. The purchasers insist that it should be returned; the assignee, that it should be retained by him for the benefit of the general creditors.

From an examination of the evidence, it seems clear that the assignee assumed to sell the property clear of the mortgage. He did not profess to sell the mere equity of redemption. The respondents in their answer claim that the sale was made free from the lien of the mortgage. They claim that the mortgage was void. And whilst it is true that the petitioners gave notice at the time of the sale, that it would be subject to their lien, the assignee and the purchasers did not act on this view. The latter never intended to purchase subject to the lien, but clear of the lien.

Had the receiver sold the property subject to the lien of the first mortgage, the amount bid for it by the respondents would have been payable by them, and would have been a

proper asset of the bankrupt company's estate. But as they did not sell it in that manner, but sold it as unincumbered property, so far as the first mortgage was concerned, and as that was a clear mistake, since the first mortgage was a valid lien and absorbed the entire property, the sale ought to be held invalid, and the proceeds of the sale ought to be returned to the purchasers. This is clearly the justice of the case, and in my judgment the law is not contrary thereto.

There ought to be a decree, therefore, setting aside the sale made by the assignee in bankruptcy, and directing a return of the purchase-money to the purchasers. This decree should include all sales of property covered by the first mortgage, and in the actual or constructive possession of the receiver appointed by the court of Escambia county. Other sales, if any there were, are not subject to question in this proceeding. The proceeds belong to the estate of the bankrupt corporation.

As the purchasers had notice of the first mortgage, and knew that the holders thereof intended to assert their rights, the costs and expenses of the assignee and others, in reference to the custody and sale of the property, should be deducted from the purchase-money to be returned.

Let a decree be framed in accordance with these views.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

All payments made before proof upon a note indorsed by the bankrupt must be applied to reduce the sum upon which a dividend can be demanded.

Payments made by the maker after the proof of the note against an indorser cannot affect the amount to be paid from the estate, so long as both payments do not exceed the sum due on the face of the note.

A bank that loans money on business paper indorsed by the bankrupt does not hold such paper as collateral security.

In re GEORGE S. WEEKS, surviving partner of the late firm of F. S. WEEKS & CO.

I, THE undersigned Register in charge of the above en-

titled matter, to whom it was referred by a special order of this court, bearing date April 17, 1875, to inquire on testimony, and report whether the petitioner referred to in said order be entitled to the dividend heretofore declared on the amount proved by said petitioner herein, or, if not, to what amount the said claim should be reduced, do hereby certify and report that I have been attended by counsel for the respective parties, and have taken all the testimony offered by them respectively, all of which is herewith handed up, and have listened to their arguments and examined their briefs, which are also herewith handed up.

The facts presented by the testimony and admissions of the parties are as follows:

The bankrupt firm had, prior to their bankruptcy, from time to time obtained money from the creditor, the Metropolitan National Bank, upon business notes owned by them, indorsing such notes and delivering them to the bank at the various times at which the money was so obtained. At the time of the adjudication of bankruptcy the bank held forty-seven notes so obtained, amounting to the sum of eight thousand eight hundred and fifty-four dollars, and five notes made by one of the said bankrupt firm, and indorsed by the other member thereof, amounting to the sum of four thousand four hundred and ninety dollars and thirty-nine cents. The bank proved a claim against the bankrupt firm for the aggregate of these two sums, to wit, thirteen thousand three hundred and forty-four dollars and fifty cents. All of these notes had matured and been protested for non-payment prior to the adjudication. This claim has been reduced by a release by the assignees to the bank, of their equity in divers other notes which had been received by the bankrupt firm as collateral security for the payment of said claim, by the sum of one thousand five hundred dollars, thereby reducing its said claim to the sum of eleven thousand eight hundred and forty-four dollars and fifty cents. Subsequently to the filing of the petition in bankruptcy, and prior to the proving of the claim in question, the sum of one hundred and twenty-

three dollars and twenty-four cents was paid upon one or more of said notes by the maker or makers thereof, thereby further reducing the claim to the sum of eleven thousand seven hundred and twenty-one dollars and twenty-six cents.

Since the proving of the claim in bankruptcy, the further sum of eight hundred and fifty-five dollars and sixteen cents has been paid upon one or more of the notes by the makers thereof. But upon no one of the notes aforesaid has the maker paid a sum equal to seventy per cent. of its face. The creditor, while admitting that the sum of one hundred and twenty-three dollars and twenty-four cents so paid upon said notes prior to the proving of its claim in bankruptcy should go to reduce its claim against the estate, insists that the sum of eight hundred and fifty-five dollars and sixteen cents, so paid upon the notes subsequently to the proving its claim in bankruptcy, ought not to be applied in reduction thereof as against the estate, but that it is applicable only to the sum which will remain due and owing after the thirty per cent. dividend shall have been received. The result of this would be that the creditor would hold in addition to the dividend of thirty per cent. claimed from the estate, all sums that have been paid since the proof of its claim in bankruptcy, and all sums that shall hereafter be paid by the respective makers, less than seventy per cent. of the aggregate sum so due on said notes, free from any claim by the assignees in bankruptcy, and would be liable to refund to them of moneys so received only such sum as should be paid in excess of such seventy per cent.; or the creditor would, at most, be liable to pay over to the assignees only such sum as should be paid upon any one or more of said notes, in excess of such seventy per cent. thereof.

It is very clear that the holder of a promissory note may sue the maker and indorser in separate suits, and recover the whole face of the note in each suit, and he may enforce the payment of both judgments. Equity would undoubtedly interfere and prevent a double payment, either by injunction or by declaring a trust in favor of the maker or indorser, or

both maker and indorser, as the case might be. That, however, it may be said, presents a question of law upon contract. It is here a question of an equitable distribution of a bankrupt's estate among his creditors. But equity never impairs a legal contract. If a man part with his goods or money upon the credit of two men under separate contracts, or a several contract, he ought to be at liberty to enforce those contracts against each debtor severally, and collect what he can from each, not exceeding the sum due. If both of such debtors should go into separate bankruptcy, his right as against each ought not to be thereby impaired. The result of this would be that such creditor could prove his claim against both estates, and receive, if the assets would admit of it, the whole sum due in such proportions from each estate as each might be able to pay. That this would be no wrong against other creditors of such estates is clear by contemplating for a moment a case where one of such bankrupts has no assets whatever, while the other estate was sufficient to pay the entire amount of the claims against it. In short, each bankrupt legally owes the entire debt, and the holder of the note is entitled by law to collect the whole from either.

There must clearly be some period or point of time at which a partial payment by a maker of a note should cease to be applied in reduction of the amount payable upon such note out of the estate of the bankrupt indorser, and when such payment should go simply to reduce the amount due from the maker. A sum larger than that actually remaining due upon the note could not be proved in bankruptcy, and hence all payments prior to such proof must be applied to reduce the sum upon which a dividend can be demanded. When that proof is once made, it ought, I think, to be conclusive as to the amount due, and not be subject to variation by subsequent payments, unless the result would be to overpay the note. A partial payment by the maker after payment of the dividend would go simply to reduce the amount due from the maker, and could in no sense affect the amount

paid from the estate, so long as both payments do not exceed the sum due, or face of the note. The period therefore in question must be either the time of proving the claim, or the time of the actual payment of the dividend. To adopt the latter as the period would subject the proceedings in bankruptcy to inconvenient fluctuation, and, in a case like the present, be a thing almost impracticable. Upon these forty-seven notes payments might have been made daily between the time of the proving of the claim and the time of paying the dividend. In such a case it would require new and successive computations to a degree that would be embarrassing. I do not see that there is any greater injustice in fixing the time at the one period than at the other, and I observe that the time of the proving of the claim is the period that seems to have been adopted in the case of *Sohier* v. *Loring* (60 Mass., 537. See also *Blake* v. *Ames*, 90 Mass., 318).

The remaining question here presented is, was the transaction between the bank and the bankrupt firm a sale and purchase of the notes, or was it a loan, indorsing over and receiving the notes as collateral security therefor.

The law will presume, in the absence of proof to the contrary, that the notes are business paper. (*Collins* v. *Martin*, 1 Bos. & Pul., 648, 651; *Holliday* v. *Atkinson*, 5 Barn. & Cres., 501.) The testimony casts no doubt upon this presumption save as to the five notes above mentioned, amounting in all to four thousand four hundred and ninety dollars and thirty-nine cents, made and indorsed by the member of the bankrupt firm, which are clearly not held as collateral security. As to all the remaining notes I understand counsel to agree that they are business paper. Referring to the concededly business paper, it may be said that they are not merely choses in action, but chattels in possession, subject to the same law as other chattels (*McNeilage* v. *Holloway*, 1 Barn. & Al., 218), and when the transaction is the creation of a subsisting debt, as the loan of money, and chattels are at the same time delivered, the presumption, in the absence of proof to the contrary, is that they are delivered as secu-

rity or pledge. There is no proof of sale, nor is there any presumption arising out of the delivery accompanying the creation of the claim here proven, that the title to the chattels passes to the bank other than as security or pledge. Again, there can be no doubt that without any demand and notice of non-payment, the bankrupt firm would be liable for all the money they received from the bank as for money had and received, or loaned. The bank parted with the money, not at the request of or to accommodate the makers of the notes or any of them, but at the request and to accommodate the bankrupt firm. The fact that one-third and over of the entire sum had of the bank was upon notes made and indorsed by the members of the bankrupt firm—had as any other loaned money is had, for which the note of the borrower is given—shows at least the character of a part of the transaction, and it would be difficult to distinguish one part of it from another so far as the question under consideration is concerned. That part clearly was a loan of money from the bank to the bankrupt firm. It is not in proof distinctly that the money had by the bankrupt firm was from time to time charged as a loan upon the books of the bank, and the notes in question merely catalogued upon the books as so much security held therefor. But the contrary is not shown, and this is believed to be the usual practice of banks in such cases. This, perhaps only partial presumption, is aided by the language used by the creditor in its formal probate of its claim—the proof of debt. In that instrument the creditor says: "That the consideration of said indebtedness was money *loaned* to the firm of F. S. Weeks & Co., upon promissory notes indorsed by said F. S. Weeks & Co." Had this loan been upon bills of lading or any other chattel instead of "promissory notes indorsed, etc.," no one would have doubted that it meant to assert that the bills of lading, or other chattel, were held merely as collateral security for a principal debt.

It should, however, be remarked that it is inferable from the whole tenor of this paper and the schedules annexed to

it, that the creditor does not mean to bottom its claim upon a loan, but rather upon the liability of the bankrupt firm as indorsers. Yet, had the transaction been the purchase of notes, the creditor would not probably have fallen into this use of language.

Although the petition of the creditor asserts that the notes were discounted by the bank, the proof of claim asserts no such thing, but leaves it (except by inference) where the language above quoted leaves it. But the use of that word would help the case but little. The word *discount* does not necessarily imply a purchase and sale. It is quite as consistent with a loan upon the security of the notes of a third party as with the sale of them. "The discounting of a note by a bank understood to consist in the lending of money upon it, and deducting the interest or premium in advance." (*The City Bank of Columbus* v. *Bruce & Fox*, 17 N. Y., 507, 515.) Bouvier says: "Among merchants the term used when a bill of exchange is transferred, is, that the bill is *sold*, and not that it is discounted." (See 3 Pet. R., 80.)

Suppose these notes had been bonds—government or otherwise—would the transaction have been different? The application by the bankrupts for money and the accommodation granted by the bank to the firm would have been from the same motives, for the same purpose, and substantially in the same form. If the bank would have received a payment of interest or principal on the notes, it would also have taken the payment of the coupons upon the bonds, or even payment of the bonds themselves if they had fallen due before the loan was paid.

Suppose accommodation paper were presented to a bank for discount and it should be discounted by the bank (in ignorance of the fact that it was accommodation paper) at a greater rate of interest than seven per cent., and in an action by the bank upon such paper, the plea of usury were interposed, can it be doubted that such a plea would prevail? yet such a plea could not prevail upon any other hypothesis than that the transaction was a loan.

Nothing ought to be presumed in favor of a sale from the fact that the bank protested the notes at maturity. It is matter of every-day observation that banks (perhaps in the interest of the notary) protest paper that falls into their possession without much regard to any necessity for doing so.

I cannot but regard this transaction, as far as all the business paper is concerned, as a loan upon the security of the notes. If so, it would be governed by Section 5075 of the Revised Statutes.

As to the debt represented by the five notes made by one of the bankrupt firm, and indorsed by the other, amounting to four thousand four hundred and ninety dollars and thirty nine cents, there seems to be no reason for saying that such five notes are held as security, and as to them the creditor should be allowed to receive its dividend. But as to the remainder of the claims, the creditor may surrender the notes to the assignees and receive the dividend, or their value may be fixed as provided in Section 5075, and a dividend paid upon the balance.

Respectfully submitted,
I. T. WILLIAMS,
Register in Charge.

BLATCHFORD, J.—I concur in the conclusion of the Register as to the first question above presented.

As to the second question above presented, I am of opinion that there was not and is not any pledge of or lien on any personal property of the bankrupts for securing the payment of any debt owing to the Metropolitan National Bank from the bankrupts, within the meaning of Section 5075 of the Revised Statutes, as respects the notes indorsed by the bankrupts.

UNITED STATES SUPREME COURT.

Under the laws of Massachusetts, a bill of sale of chattels, although it is not placed upon record, or accompanied by possession of the property, vests a complete title in the grantee, subject to be defeated by some intervening right before possession is taken.

When possession is taken of a chattel under a bill of sale not placed on record or accompanied by possession, the instrument, under the laws of Massachusetts, takes effect as against third persons as well as between the parties from the time of its execution, unless intervening rights have been obtained.

An exchange of securities is not a fraudulent preference even when the creditor and debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and is undoubtedly of equal value with the security substituted for it.

If a bill of sale, under the laws of the State, although it is not placed on record or attended by possession of the property, vests a complete title in the grantee, subject only to be defeated by some intervening right acquired before the record is made or possession taken, it will constitute a sufficient consideration for a mortgage, although there was an agreement that it should not be recorded and should be kept secret.

JABEZ A. SAWYER and LYMAN B. FRAZIER, Appellants, v. *EDWARD TURPIN, AUGUSTUS HENRY NOVELLI, FRANCIS KOENIG, and HARDY BOWKER.*

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

I. G. Abbott and *Benj. Dean*, for appellants.

Joshua D. Ball, for appellees.

STRONG, J.—The only question presented by this appeal is whether the mortgage given by the bankrupt on the 31st day of July, 1869, to Edward Turpin, the agent of Novelli & Co., was a fraudulent preference of creditors within the prohibition of the Bankrupt Act, and, therefore, void as against the assignees in bankruptcy. That it was a security given for the protection of a pre-existing debt, and that it was given within four months immediately preceding the filing of the petition in bankruptcy, are conceded facts. It may also be admitted that the bankrupt was insolvent when the mortgage was made, and that the creditors had then reason to believe he was insolvent.

The petition in bankruptcy was filed on the 22d of October, 1869. On the 15th of May next preceding that date Bacheller, the bankrupt, who was indebted to Novelli & Co. in the large sum of twenty-seven thousand eight hundred and thirty-nine dollars in gold, conveyed to Turpin, who was their agent, as a security for the debt, the building described in the subsequent mortgage of July 31st. It was a frame building erected upon leased ground, and Bacheller had, therefore, only a chattel interest in it. The conveyance was by a bill of sale absolute in its terms, having no condition or defeasance expressed, but it was understood by the parties to be a security for the debt due. It was, in substantial legal effect, though not in form, a mortgage. Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded, and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any, but there were none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument, and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution. In regard to chattel mortgages, the recording statutes of Massachusetts, enacted in 1836, provide as follows: "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." (Revised Statutes, Chap. 74, p. 473.) The statute contains a clear recognition of the validity of an unrecorded chattel mortgage, as between the parties to it; though no possession be taken under it. And the General Statutes of the State, enacted in 1860

(Gen. Stats. Chap. 151, p. 769), contain the same recognition. Their language is the following: "Mortgages of personal property shall be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the city or town in which he then principally transacts his business, or follows his trade or calling. If the mortgagor resides without the State, his mortgage of personal property within the State, when the mortgage is made, shall be recorded on the records of the city or town where the property then is. Unless a mortgage is so recorded, or the property mortgaged is delivered to, and retained by the mortgagee, it shall not be valid against any person, *other than the parties thereto*, except as provided in the following section." The exception extends only to mortgage contracts of bottomry or respondentia, to transfers, assignments, or hypothecations of ships or vessels, and to transfers in mortgage of goods at sea or abroad. Neither of these acts prescribes when the record must be made, or the possession be taken, but when made, the instrument takes effect, as against third persons as well as between the parties, from the time of its execution, unless intervening rights have been obtained. In *Mitchell et al.* v. *Black et al.*, 72 Mass., 100, it was ruled by the Supreme Court of Massachusetts that one who had taken bills of sale of merchandise from his debtor, as a security for money advanced, and who had allowed the debtor to sell portions of the merchandise in the usual course of his business, as if he were the owner thereof, might take possession of it at any time in order to secure his debt, and that such taking of possession, though at a time when the debtor was known by himself and the creditor to be insolvent, was effectual, notwithstanding the State Insolvent Law, which contained provisions very like those of the Bankrupt Act. The court held unqualifiedly that the bills of sale, absolute as they were in terms, though in fact intended only as a security, and though unattended by possession of the property, and though not placed upon record, vested a complete title in the creditor, subject only to be defeated by the discharge of the debt, or by some

intervening right acquired before the possession was taken. This was a case of bills of sale, like the present, not a case of a technical mortgage. In speaking of the registration of mortgages the court said: "The time when the record shall be made is not specifically prescribed (by the statute), though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage."

It should not be doubted, then, that the bill of sale of May 15th, 1869, conveyed to Turpin all Bacheller's interest in the frame building; that it was effective for the purposes for which it was made; and no other rights having intervened, that it was a valid security, to the extent of the value of the property, for the debt due Novelli & Co. on the 31st of July, 1869, when the mortgage impeached by the bill was made. The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was therefore a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the Bankrupt Law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts Insolvent Laws (*Stevens* v. *Blanchard*, 57 Mass., 169), and the same thing has been determined with reference to the Bankrupt Act. (*Cook* v. *Tullis*, 9 N. B. R., 433; 18 Wall., 332; *Clark* v. *Iselin*, 11 N.

B. R., 337; 21 Wall., 360; *Watson* v. *Taylor*, 21 Wall., 378; and *Burnheisel* v. *Firman*, 11 N. B. R., 505.) The reason is that the exchange takes nothing away from the other creditors. It is, therefore, not in conflict with the 35th Section of the act, the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto.

It follows that the mortgage of July 31st was not prohibited by the Bankrupt Act when it was given, and that it was valid. Hence, as it was recorded on the 17th day of September, 1869, pursuant to the requisitions of the State law, before any rights of the assignees in bankruptcy accrued, it cannot be impeached by them.

It has been argued, however, on behalf of the assignees, that the bill of sale of May 15th was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin that it should not be recorded, and should be kept secret. If the fact were as alleged, it is not perceived that it would be of any importance, for it is undeniable that the bill of sale rested on a valuable consideration, to wit, the debt of twenty-seven thousand eight hundred and thirty-nine dollars in gold, due to Novelli & Co., and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was, therefore, a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the Bankrupt Act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded, or that possession should not be taken under it.

Upon all points, therefore, the case is with the appellees, and the decree of the Circuit Court must be affirmed.

UNITED STATES CIRCUIT COURT—LOUISIANA.

The prosecution of an action in a State court relating to property held by the bankrupt, may be continued, if it was begun before the commencement of the proceedings in bankruptcy.

Although a suit is pending in a State court at the time of the commencement of the proceedings in bankruptcy, yet a writ of sequestration cannot be issued after that time to take the property from the possession of the assignee.

The District Court may enjoin parties to an action pending in a State court, from proceeding under a writ of sequestration, to take property from the possession of the assignee.

HEWETT, Executor, v. *NORTON, Assignee.*

THIS is a petition addressed to the supervisory jurisdiction of the Circuit Court, under Section 2 of the Bankrupt Act, to review an order of the District Court sitting in bankruptcy.

Mr. Edward Phillips, for petitioner.

Mr. R. H. Marr, for defendant.

WOODS, J.—Zebulon York and Elias J. Hoover were, by the last will of Jacob Hoover, dated January 28, 1859, made his executors and universal legatees. Jacob Hoover died on the 27th day of August, 1859, in the parish of Concordia, in the State of Louisiana, and said York and Hoover, by virtue of said will, took possession of his estate, both real and personal, claiming title thereto under the will.

On the 13th of December, 1859, the heirs of Jacob Hoover, deceased, filed in the District Court of Concordia parish, their petition against York and Hoover, alleging that said paper writing purporting to be the last will of Jacob Hoover, was not his last will; praying that the same and the probate thereof might be set aside and avoided, and for an account; and pending this suit, to wit, in March, 1869, York and Hoover filed their petition in bankruptcy, in the United States District Court of Louisiana, were adjudged bankrupts, and surrendered to E. E. Norton, their assignee, certain

plantations and other property which they claimed under the will of Jacob Hoover.

On or about the 13th of October, 1869, the petitioners in said action to set aside the will of Jacob Hoover filed an amended petition, in which they set out new grounds for avoiding the will of Jacob Hoover, and prayed that a writ of sequestration might issue to the coroner of Concordia parish, directing him to take possession of said property so surrendered by York and Hoover to Norton, their assignee. The District Court of Concordia parish, on a hearing of this amended petition at chambers, on the 5th of November, 1869, ordered the writ of sequestration to issue as prayed for.

On the 13th of June, 1870, Norton, as assignee of York and Hoover, applied by petition to the United States District Court, for an order enjoining and restraining the petitioners in the suit pending in the District Court of Concordia parish, from any further proceedings therein. Such an order was made by the United States District Court, sitting in bankruptcy, and it is to review and reverse such order that this petition is addressed to the Circuit Court.

The case presents two questions:

First. Whether the suit in the Concordia District Court to try the title to the property surrendered by York and Hoover, by an attack on the will of Jacob Hoover, ought to be allowed to proceed; and

Second. Whether that court ought to be allowed, by a writ of sequestration pending the trial of the title to the property, to take the property out of the possession of the assignee in bankruptcy.

Of these, in their order, I think the first question is settled by the 25th and 14th Sections of the Bankrupt Act.

The 25th Section provides, that whenever it shall appear to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of an assignee, is in dispute, the court may order it to be sold under the direction of the assignee, who shall hold

the funds received in the place of the estate disposed of. And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties *in any court*, but this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders a sale.

It seems clear from these provisions, that it is not the purpose of the Bankrupt Act to abate suits commenced before bankruptcy, in which the title to the property surrendered by the bankrupt is in litigation. This view is strengthened by the provisions of the 14th Section, to the effect that the assignee may prosecute and defend all suits at law or in equity pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party in his own name, in the same manner and with the like effect as they might have been prosecuted or defended by such bankrupt.

The provisions of this section include suits and actions pending in the State courts, and are addressed to the courts in which such suits or actions are pending, quite as much as to the Federal courts. The State courts having jurisdiction of the parties and subject-matter, must determine the questions as they arise, according to law, subject to the final judgment of the proper appellate tribunal. (*In re* Clark *et al.*, 3 N. B. R., 491; *Samson* v. *Burton*, 4 *Id.*, 1.

I am unable to arrive at the conclusion, as I must do if I affirm the order of the District Court, that upon the filing of a petition in bankruptcy, all suits pending in the State courts in which the bankrupt is a party abate, and that new actions must be brought in the Bankrupt Court, either by or against the assignee.

I am of opinion, therefore, that the injunction allowed by the District Court, so far as it operated to restrain the parties from proceedings in this suit in the District Court of Concordia parish, to try the title to the property surrendered by York and Hoover, was improvidently granted.

Upon the second question raised by the petition of review,

I am quite as clear that the action of the District Court in restraining the parties from proceeding to take the property out of the possession of the assignee in bankruptcy, by a writ of sequestration issued from the State courts, was right and ought to be affirmed.

When York and Hoover filed their petition in bankruptcy, they had the apparent legal title to the property in controversy, and were in possession. They surrendered the title to the property and the possession to their assignee.

As soon as a petition in bankruptcy is filed, the property of the insolvent is thereby brought *eo instanti* into the Bankrupt Court, and placed in its custody, and no other court, and no person acting under any process from any other court can, without the permission of the Bankrupt Court, interfere with it, and to so interfere is a contempt of the Bankrupt Court. (See Bump on Bankruptcy, Ed. of 1871, p. 245, and numerous cases there cited.)

In order to recover property from the possession of the assignee in any court, it must be by proper action, commenced before the Bankrupt Court orders a sale of the property. (Bankrupt Act, Section 25.)

The proceeding to sequester the property surrendered by York and Hoover, was not commenced until the 13th day of October, 1869, long after the Bankrupt Court had ordered a sale, and the property had been put up to sale and bid off. Even if such proceedings could be permitted to a State court, they came too late.

In accordance with these views, it is decreed that so much of the decree of the District Court as authorizes the injunction to restrain the petitioners from proceeding in the action in the State court be set aside, and so much as authorizes an injunction restraining the petitioners from proceeding under the writ of sequestration be affirmed. And it is ordered that the injunction be modified accordingly.

UNITED STATES CIRCUIT COURT—E. D. TEXAS.

A mortgagee does not lose his lien by omitting to prove his debt, but may enforce the mortgage after the termination of the proceedings in bankruptcy.

A sale of land by an assignee, without an order of court, does not divest the lien of a mortgage.

ASSIGNEE OF WICKS & CO. v. *PERKINS.*

IN EQUITY. The case was submitted on exceptions to the sufficiency of a plea to the bill of complaint.

Messrs. Peter W. Gray and *W. B. Botts*, for complainant.

Messrs. John W. Harris and *Branch T. Masterson*, for defendant.

WOODS, J.—The bill was filed on September 10, 1870, and alleges in substance, that on the 1st day of April, 1867, the defendant, Henry E. Perkins, being indebted to George A. Wicks & Co. in a large sum of money, made and delivered to said Wicks & Co. his four promissory notes of that date, for four thousand two hundred and fourteen dollars and twenty-nine cents each, payable to their order at the Houston Insurance Company in the city of Houston, in six, twelve, eighteen, and twenty-four months respectively, with eight per cent. interest. On the same day, in order to secure the payment of said notes, Perkins executed to Andrew J. Burke a deed of trust in the nature of a mortgage, conveying to him certain real estate in the Eastern District of the State of Texas. The said deed of trust was subject to the condition, that if said Perkins should pay the notes aforesaid when they fell due, the deed should be void; otherwise the said Burke was authorized to sell at public sale the property conveyed to him by said deed, and apply the proceeds of the sale to the payment of the principal and interest due on said notes, and the surplus, if any, he was required to pay to said Perkins. The said notes were afterwards, and before maturity, transferred

to complainant, together with the benefit of the security of said deed of trust.

The bill further alleges that Perkins failed to pay the notes at their maturity, and the trustee, Burke, has failed and neglected to execute the powers conferred on him by the deed of trust. Perkins still remains in possession of the said real estate, and at the December Term, 1868, of the District Court of the Eastern District of Texas, applied for and obtained his discharge in bankruptcy; that John W. Harris, one of the defendants, claims to have purchased said real estate included in said deed of trust, at a sale thereof by the assignee in bankruptcy of said Perkins, but no valid sale of said lands was made that could in equity affect complainant's lien; no valid order or decree of the court for the sale of said lands was made so as to affect said lien; that no person authorized so to do has ever applied for such order of sale, and complainants never had notice of such proceedings, as required by law, and that no lawful order for sale of said lands has ever been made by the court having jurisdiction thereof.

The bill prays that said lands may be sold disencumbered of any claim or title of said Harris, and the proceeds applied to the payment of the amount due on the notes secured by said deed of trust.

To this bill a plea is interposed which alleges in substance, that on the 23d day of December, 1868, the defendant, Perkins, filed his petition to be adjudged a bankrupt; that on the 3d day of February, 1869, he was so adjudged; that the debt of complainants was provable in bankruptcy; that complainants had notice of the proceedings in bankruptcy before the filing of their bill of complaint, and that they neglected and failed to prove their debt in the said proceedings in bankruptcy as required by law. The case is submitted on the sufficiency of this plea.

It appears from the pleadings that Perkins, the bankrupt, received his final discharge before the filing of the bill in this case. The plea, therefore, presents the question, whether the lien of a mortgage creditor on the real estate of

the bankrupt is lost by his failure to prove his debt, so that after the termination of the proceedings in bankruptcy he cannot enforce his lien.

I think this proposition must be decided in the negative. A secured creditor can resort to one of three remedies: 1. He may rely upon his security. 2. He may abandon it and prove the whole debt as unsecured; or, 3. He may be admitted only as a creditor for the balance remaining after the deduction of the value of the security. If he takes either of the two courses last named, he must of course prove his debt. But suppose he chooses to rely upon his security, there is no positive provision nor is there anything in the policy of the Bankrupt Law requiring proof of the debt, unless he seeks the aid of the Bankrupt Court to enforce his lien.

By the 20th Section of the Bankrupt Act, the assignee may sell encumbered property of the bankrupt, subject to the claim of the secured creditor thereon. This he may do without petitioning the court, or without any order of the court, but where he so sells, he does so subject to all lawful encumbrances, and can convey no higher or better interest. The proceeds of the sale are supposed to be the price and value of the interest so sold, with a knowledge of encumbrances.

Such a sale does not, therefore, affect the lien of the creditor. Is it lost by the mere fact that he does not prove his debt? I think not. He may rest on his security and enforce it at any time he pleases, either before or after the end of the proceedings in bankruptcy. Of course he loses any claim against the bankrupt personally, but he still has the right to proceed against the property, the lien on which the law has preserved to him.

The only objection to this view is found in the opportunity it might afford the bankrupt to shield his property from the claims of just creditors by covering it with fraudulent liens. The answer to this is that it is always in the power of the assignee, if he suspects that the property of the bankrupt has been fraudulently encumbered, to obtain an order

of court to sell it free from encumbrances, and compel the lien holders to make good their claims by proof before a distribution of the proceeds of the sale.

The fact that an assignee asks for a sale of property subject to encumbrances, is an admission on his part that the encumbrances are *bona fide*. On such a sale the lien of the creditor is left intact, and he can take his own time to enforce it.

After the end of the proceedings in bankruptcy, the lien creditor may apply to any court of competent jurisdiction to enforce his claim. This is what the complainants in this case have done.

The property, according to the averments of the bill, was sold, subject to their lien, and they have not lost their lien by failing to prove their debt.

I think, therefore, that the matter set forth in the plea is no sufficient answer to the bill. The plea must therefore be overruled.

UNITED STATES CIRCUIT COURT—W. D. TEXAS.

A trader who cannot pay his debts in the ordinary course of business, is insolvent, although he is not compelled to stop business, and may on a settlement of his affairs have sufficient to pay in full.

An assignment for the benefit of creditors by an insolvent debtor, is conclusive evidence of an intent to defeat the operation of the Bankrupt Law.

The trustee and all persons claiming under an assignment for the benefit of creditors, are chargeable with a knowledge of its terms, and consequently with knowledge of the insolvency of the debtor, and his intent to defeat the operation of the Bankrupt Law.

An assignment for the benefit of creditors may be set aside at the suit of the assignee.

A. M. JACKSON, Assignee, v. *H. E. McCULLOCH et al.*

In Equity. Appeal from the District Court, submitted for final decree on pleadings and evidence.

Mr. A. M. Jackson, in *pro. per.*

Mr. C. S. West, for defendants.

Jackson, Assignee, v. McCulloch et al.

WOODS, J.—This is a bill in equity filed by A. M. Jackson, as assignee in bankruptcy of George B. Hollaman, to set aside a deed of assignment made by Hollaman to H. E. McCulloch, one of the defendants, for a decree, that the defendants Frazer and wife, Leroy M. Roberts, and John P. Erskine, pay to the complainant the amount respectively received by them from McCulloch, by virtue of the deed of assignment, on the debts due to them from the bankrupt, and that McCulloch be compelled to account for and pay over the proceeds of the property sold by him under and by virtue of the deed of assignment, subject to such equitable deductions as he may show himself entitled to. The ground of this claim is because the deed of assignment was made within six months before the filing of his petition in bankruptcy by Hollaman, and was made to McCulloch, who, at the time, had reasonable cause to believe that Hollaman was insolvent, or was acting in contemplation of insolvency, and that the deed of assignment was made by Hollaman with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the Bankrupt Act of Congress, or to defeat the object of said act, or to impair, hinder, or delay the operation of said act, or to evade the provisions thereof.

I hold the following propositions to be established law:

First. Insolvency, within the meaning of the Bankrupt Act, means inability to pay debts in the ordinary course of business, as persons carrying on trade usually do.

A trader is insolvent when he cannot pay his debts in the ordinary course of business, although he may not be compelled to stop business from his inability: and although, on a settlement of his affairs, he may have sufficient to pay in full.

Second. An assignment to a trustee of all a trader's property in trust for the benefit of his creditors, which necessarily puts an end to the business of the debtor, and which gives a preference to some creditors over others, is made out of the usual ordinary course of business, and, if made in contem-

plation of insolvency, is not only *prima facie* but conclusive evidence of an intent on the part of the debtor to defeat the operation of the Bankrupt Act, and is therefore void.

Third. The trustee is charged with notice of the insolvency of the debtor, and his intent to evade the provisions of the Bankrupt Act, by the very terms of such an assignment. All persons claiming the benefit of such an assignment are chargeable with knowledge of the terms thereof, and consequently with knowledge of the insolvency of the debtor, and his purpose to evade the operation of the Bankrupt Law.

The bare enunciation of these principles disposes of this case.

At the date of the deed of assignment, Hollaman was insolvent, and he knew it. It was his duty to go into bankruptcy, but instead of this, he chose to make an assignment, giving preference to certain of his creditors. He, therefore, intended to defeat the operation of the Bankrupt Act, which requires equal distribution among the creditors of the bankrupt's assets.

The deed to McCulloch was notice to him and to all claiming the benefit of the deed, of the insolvency of Halloman, and of his purpose to evade the operation of the Bankrupt Act.

The conclusion is inevitable, that the deed of assignment must be declared null and void; that Frazer and wife, Erskine, and Roberts must pay to the assignee the amounts received by them respectively from McCulloch, and where such amounts were paid in coin, must repay the same in coin or its equivalent in currency; that McCulloch must account for the proceeds of the property received and disposed of by him under the deed of trust, and not already turned over to the assignee in bankruptcy, allowing him credit for his reasonable services and expenses in selling the property, and for whatever may be collected from his co-defendants, Frazer and wife, Roberts, and Erskine.

Decree accordingly.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A mere preference given without contemplation of the proceedings in bankruptcy, and more than six months before the filing of the petition, is no ground for withholding a discharge.

A fraudulent conveyance made at a time so recent that it will affect any of the creditors who can come in under the bankruptcy, is a ground for withholding the discharge.

In re OLIVER L. JONES.

I. T. Drew, for the bankrupt.

W. J. Copeland, for objecting creditors.

LOWELL, J.—Jones was made a bankrupt in the District of Maine, upon the petition of a creditor, and was there examined very fully. The proceedings were afterwards dismissed, and Jones came to Massachusetts, and after his residence here had been long enough, filed a voluntary petition, which has been proceeded with, and objections to his discharge have been specified and argued.

It is thought by the objecting creditors that the dismissal of the former proceedings was made for the very purpose of getting rid of the objection that preferences had been given within four months of the petition in that case. And it is said that no notice was given to creditors of the proposed order to dismiss. If so, it must have been an accident, for the law has always been, until lately, that a man once in bankruptcy, cannot go out again without the consent of every creditor. The importance of that rule is shown by this case. Now, by the Statute of 1874, proceedings may be dismissed with the written consent of the debtor, and of not less than one-half of his creditors in number and amount, if, after notice to the other creditors, the court shall approve. (18 Stats., 182.) But the court would not be likely to approve a dismissal, if its effect would be to obviate valid objections to the bankrupt's discharge, which any creditor desired to avail of.

Perhaps, if it is not too late, and if it be true that the dismissal was fraudulent, there may be power in the courts, or one of them, in the District of Maine, to reinstate the case.

As the case stands here, it is admitted that mere preferences cannot be set up against the discharge, which were given without contemplation of this bankruptcy, and more than six months before the petition.

The objecting creditors allege further that certain conveyances which were made by the bankrupt, and which are admitted to have been preferences, were likewise fraudulent conveyances, and as such, may be objected to the discharge, though they were made long before the bankruptcy. It has been held that such a fraud, though committed before the Bankrupt Law was passed, may be availed of for this purpose. There is no doubt of the power of Congress to make the discharge dependent upon any conditions it chooses to establish; but I have always been of opinion that it has not expressed an intent that a fraud committed before the law was passed, or at least before it was proposed, should be ground for refusing the discharge. That point is not important here. The true construction of the statute does seem to me to be that a fraud at common law, or under the statutes of the State, may be objected, if it was made at a time so recent that it would affect any of the creditors who can come in under the bankrupt.

It appears to me, upon examination of the evidence here, that one at least of the conveyances proved to have been made by the bankrupt was not only a preference, but an actual fraud. That is to say, though there was the consideration of a debt, there was likewise an intent to conceal and withdraw the property from creditors, and not a simple and *bona fide* intent to pay or secure the debt. In another of the transactions, there was a secret reservation of a benefit to the debtor, if the property should be more than sufficient to pay the debt, and though this did not prove to be so, the fraud was complete before the result was determined.

The legal effect of such evidence depends on Rev. Stats., Section 5110, Clause 5, under which, as I have intimated, a preference probably means, either one that would have been voidable by the assignee in this case, or at least one that was made in contemplation of this bankruptcy. But the fraudulent payment, conveyance, or loss by gaming do not appear to be thus limited, and seem to include all such payments, conveyances, and losses as have diminished the assets which otherwise would have come to the assignee.

Discharge refused.

UNITED STATES SUPREME COURT.

The declarations of the bankrupt in regard to a transfer made as a preference, are competent evidence against the preferred creditor, if the conspiracy to give the preference is established, although they were not made in the presence of or brought to the knowledge of the preferred creditor.

The declarations of an alleged partner of the bankrupt in regard to the existence of the alleged partnership, are not competent evidence.

The court, in instructing the jury, may comment upon the evidence, if the jury distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment.

A transfer of property to a factor, so that it may become subject to his lien, and with the intent thereby to give him a preference, may be set aside.

The personal conduct and administration of the Federal judges, in the discharge of their functions, need not conform to the practice in the State courts.

IRA P. NUDD and S. R. NOE, Plaintiffs in Error, v. *GEORGE B. BURROWS, Assignee of the estate of NORTON EMMONS, a bankrupt.*

In error to the Circuit Court of the United States for the Northern District of Illinois.

SWAYNE, J.—The first of the assignments of error presents the question whether the court erred in admitting in evidence the declarations of the bankrupt.

The suit was brought by the assignee to recover against Nudd and Noe for money and property which they had received from Emmons. They had applied the money and the proceeds of the property in payment of a debt which Emmons owed them. The property was live stock, consisting of cattle, sheep, and hogs. The net proceeds were seven thousand five hundred and fifty-three dollars and twenty-seven cents. The money was one thousand dollars. The aggregate amount in controversy was eight thousand five hundred and fifty-three dollars and twenty-seven cents. The assignee claimed that the stock was bought largely upon credit; that Emmons was at the time hopelessly insolvent; that Nudd and Noe knew it, and that the transaction was

the fruit of a conspiracy between the parties, having for its object the giving to Nudd and Noe by Emmons a fraudulent preference over his other creditors.

Nudd and Noe received the property and money in January, 1871. The petition in bankruptcy against Emmons was filed in the following month of February. The action is founded on the 35th and 39th Sections of the Bankrupt Act. The transaction was within four months before the filing of the petition. Upon the trial the plaintiff proposed to prove what Emmons had said touching the purchase of the stock and the payment of the money to the defendants.

To each and all of the questions asked with this view, the counsel for the defendants objected, "on the ground that they called for the declarations of Emmons not made in the presence of either of the defendants, or brought to their knowledge."

Was this ground of objection well taken?

The counsel for the defendant in error insists that they were competent as the declarations of a co-conspirator.

In general the rules of evidence are the same in civil and criminal cases. (*United States* v. *Gooding*, 12 Wheat., 460, 469.)

"Where two or more persons are associated for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence." (*Amer. Fur Co.* v. *United States*, 2 Pet., 358.)

The bill of exceptions does not purport to give all the evidence. What proof had been given of the alleged concert and conspiracy on the part of the defendants when the declarations of Emmons were offered to be proved, does not appear.

It is to be presumed it was sufficient to lay the proper foundation as to them for the introduction of the evidence. The declarations were competent to prove the whole case as against Emmons. (1 Taylor's Evidence, 486.)

Whether the declarations were made in the presence or

brought to the knowledge of either of the defendants is immaterial. The objection as taken was confined to this point, and this is the only aspect in which it is necessary to consider it. If it were intended to rest it upon any other ground, it should have been so presented, and the court advised accordingly.

In the early part of December, 1870, Emmons and James W. and Richard Chandler were partners, under the name of Emmons & Chandler. The plaintiff claimed that the partnership was dissolved on the 13th of that month. The defendants insisted that it continued down to the close of the business in question, and that the transaction was not with Emmons alone, but with the firm of Emmons & Chandler.

They offered in evidence the declarations of the Chandlers touching the points in controversy. The court excluded the testimony and the defendants excepted.

This ruling was correct. The declarations of a party may be evidence against him, but, except under circumstances which had no existence in this case, they cannot be received in his favor. The Chandlers might have been called as witnesses. Their declarations were merely hearsay, and as regards this case were *res inter alios acta.*

It appears by the bill of exceptions that in charging the jury the judge commented upon the evidence.

Questions of law are to be determined by the court—questions of fact by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former.

No question of fact must be withdrawn from the determination of those whose function it is to decide such issues.

The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory and in no wise intended to fetter the exercise finally of their own independent judg-

ment. Within these limitations it is the right and duty of the court to aid them, by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such case chance, mistake, or caprice may determine the result.

We do not think the remarks and suggestions of the learned judge in this case exceeded the proper license.

They did not go beyond the verge of what has been often sanctioned by this and other courts. (*Games et al.* v. *Stiles*, 14 Pet., 322; *United States* v. *Fourteen Packages*, Gilp., 235, 254; 1 Taylor's Evid., 35.)

The modifications of the two instructions asked for by the defendants, were, we think, correct in point of law. Only the second one calls for any remarks.

There was proof tending to show that on the 13th of December, 1870, the defendants adjusted their account with Emmons & Chandler, and by the agreement of all the parties transferred the amount due to themselves to the separate account of Emmons, and gave the Chandlers a release. The balance found due, and so transferred, was the same with the amount in controversy, as before stated. The business of the defendants was the selling of live stock upon commission. The balance accrued in the course of their previous business in this way with the firm of Emmons & Chandler. They claimed a factor's lien upon the money and proceeds of the property in question for the satisfaction of this demand.

The court charged that as the lien could not attach until the money and proceeds were received by the defendants—if the previous transactions created the relation of debtor and creditors between them and Emmons, and they could have sued Emmons for the amount—"this would bring the debt under the Bankrupt Act the same as any other debt."

This must necessarily be so. The lien attempted to be set up was repelled by the circumstances referred to. Such a claim occupies no better ground than would a mortgage, pledge, or power to confess judgment given at the same time and for the same purpose. Otherwise every factor might be thus secured when his debtor was in the article of bankruptcy, and this class of creditors would have a monopoly of the preferences so given. Such preference, to whomsoever given, is forbidden by the Bankrupt Law and is a fraud upon it. Fraud destroys the validity of everything into which it enters. It affects fatally even the most solemn judgments and decrees. (Bankrupt Act, Section 35; 1 Story's Eq., Section 252; Freeman on Judgments, Section 486.)

Whenever fraud is perpetrated by one party to the injury of another, the offender is liable. (*Pasley* v. *Freeman*, 3 T. R., 51; *Benton* v. *Pratt*, 2 Wend., 385.) Here the jury have found the facts charged by the assignee. This is conclusive against the defendants with respect to any claim upon the fund.

The last assignment relates to alleged errors of the court in matters of practice. Before the judge began his charge to the jury, the counsel for the defendants requested him in giving it to conform in all things to the practice of the courts of record and the law of the State. This he refused to do. He also refused to allow the jury to take with them to their room the written instructions he had given them, and likewise the account-book, bills of lading, and additional papers which had been introduced in evidence, other than the depositions. To each of these refusals the defendants excepted.

The practice act of Illinois provides, that the court in charging the jury shall instruct them only as to the law of the case; that no instructions shall be given unless reduced

to writing; that instructions asked shall not be modified by the court except in writing; that the instructions shall be taken by the jury in their retirement and returned with the verdict, and that papers read in evidence, other than depositions, may be carried from the bar by the jury. (1 Gross' Stat., 289.)

It is declared by the Act of Congress of June 1, 1872, Section 5, "That the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform as near as may be" to the same things "existing at the time in the courts of record of the State within which such Circuit and District Courts are held."

The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality. It had its origin in the Code enactments of many of the States. While in the Federal tribunals the common-law pleadings, forms, and practice were adhered to, in the State courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected or sought a remedy in that direction.

We see nothing in the act to warrant the conclusion that it was intended to have such an application.

If the proposition of the counsel for the plaintiff in error be correct, the powers of the judge, as defined by the common law, were largely trenched upon.

A statute claimed to work this effect must be strictly

construed. But no severity of construction is necessary to harmonize the language employed with the view we have expressed. The identity required is to be in "the practice, pleadings, and forms and modes of proceeding." The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither *practice, pleading*, nor *a form* nor *mode of proceeding*, within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them or dictate the manner of their exercise are interesting questions, but it is unnecessary in this case to consider them. (*Houston* v. *Williams*, 13 Cal., 24.)

The judgment of the Circuit Court is affirmed.

UNITED STATES DISTRICT COURT—GEORGIA.

No individual exemption can be allowed out of the partnership estate at the expense of the joint creditors.

In re STEWART & NEWTON.

CERTIFIED question, from Mr. Register Murray, on claim of John O. Stewart for homestead and exemption.

Messrs. Speer & Stewart, attorneys for bankrupt.

R. H. Johnston and *D. N. Martin*, attorneys for objecting creditors.

ERSKINE, J.—The firm of Stewart & Newton, and Stewart individually, became bankrupts. The assignee converted the partnership estate, which consisted of goods and merchandise, into cash, and he has now in his hands about one thousand dollars arising from this sale. Stewart, one of the late copartners, claims, as the head of a family, that this money

ought to be exempted to him, as personalty, to be invested by the court for the benefit of himself and family, under the provisions of the Bankrupt Act and the Constitution and laws of this State. The Register allowed this claim. The creditors of the firm objected, and the question was certified to this court by Register Murray.

On more than one occasion the precise question has been before this court, and has always been answered in the negative. And notwithstanding District Courts have entertained opposite views on this subject, I am still of the opinion that neither the letter nor spirit of the law, or the Constitution or laws of Georgia, warrant the allowance of such a claim, to the exclusion of the joint creditors of the bankrupt firm. (Code, Sections 2002 to 2039.)

In re Handlin & Venny, 12 N. B. R., 49; s. c. 2 Cent. L. J., 264, Dillon, Circuit Judge, said: "While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate at the expense of the joint creditors."

The case was carefully considered by that learned and eminent judge, and nothing that I could add would strengthen its authority.

The decision of the Register is reversed. Clerk will so certify.

UNITED STATES CIRCUIT COURT—N. D. GEORGIA.

An attaching creditor may intervene and oppose an adjudication of bankruptcy.

A person who gives a note when he has ceased to be a trader, does not commit an act of bankruptcy by suspending payment thereof, although the note is given for a debt contracted while he was a trader, for the law requires that he shall be a trader at the time of making the note.

In re FRANCIS M. JACK.

THIS was a Petition of Review, filed by Hall & Allin and

other judgment creditors of the bankrupt, under the 2d Section of the Bankrupt Act, to review certain proceedings in the District Court sitting in bankruptcy.

Mr. L. E. Bleckley, for petitioners.

Mr. D. F. Hammond, contra.

WOODS, J.—One Er. Lawshé filed a petition in the District Court for Northern Georgia, praying that Francis M. Jack might be declared a bankrupt, on the sole ground that, being a trader, he had fraudulently stopped payment of his commercial paper, and had not resumed payment of the same within a period of fourteen days.

Before the adjudication, Hall & Allin and L. Schiffer & Nephews, judgment creditors of Jack, applied to the Bankrupt Court for leave to intervene and object to the making of any order adjudicating Jack a bankrupt, and alleged the following grounds against such adjudication:

First. That they had unsatisfied judgments against Jack, and had attached his property by garnishment in the State Superior Court, and had thereby obtained certain rights under the State laws, which would be lost by the adjudication of bankruptcy; and that the estate of Jack was very small and much less than the amount of judgment debts against him, and the proceeding in bankruptcy would, if allowed, illegally dispose of Jack's estate to the great detriment of his judgment creditors; and

Second. Said proceedings were void, because they were begun and carried on by collusion between Jack and Lawshé, the petitioning creditor; and

Third. Because Jack was not a trader at the time of the execution of said note, nor for a long time previous thereto, nor at any subsequent time, but had retired from business entirely, and was hopelessly insolvent at the time of the execution of the note; and the debt for which the note was given was not in any manner contracted by him in the business of a trader.

The Bankrupt Court refused to allow the petitioners in

review to intervene and object to the adjudication, and proceeded to adjudicate Jack a bankrupt.

The petition of review alleges that the overruling of the motion to allow the petitioners to intervene and object to the adjudication of bankruptcy, and the adjudication itself, were erroneous.

The facts alleged in the petition of review, and in the motion of petitioners before the Bankrupt Court, are not traversed, and we must take them to be substantially true.

If the facts stated in the motion of petitioners had been shown to the Bankrupt Court, ought that court to have declared Jack a bankrupt?

Jack, on the 30th of December, 1872, executed his note of that date, payable ten days after date to the order of Er. Lawshé, for three hundred and twelve dollars and sixty-nine cents, at J. H. James's office in Atlanta, Georgia.

The note was given for an antecedent debt of two years' standing; for a debt contracted when Jack was a trader; but at the time when the note was executed, and for a long time previous, Jack had ceased to be a trader.

Under this state of facts could he have been adjudicated a bankrupt, if resistance had been made to the adjudication?

The Bankrupt Act, Section 39, provides: "That any person residing and owing debts as aforesaid (namely, as provided in Section 11), who, being a trader, has stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy." The language of this section clearly indicates that the making of the note must have been done while the party was a trader. A person who, having ceased to be a trader, gives a note and suspends payment, does not commit an act of bankruptcy, even though the debt for which the note was given was contracted while he was a trader.

The reason of the law does not apply to such a case. When a man enters the commercial community as a trader or merchant, he assumes all the responsibilities which attach

to his calling. One of these is the obligation to pay at maturity his commercial paper. But if he has ceased to be a trader, and has no commercial paper outstanding, he resumes his position with the great mass of mankind, and is subject no longer to the liabilities of a trader. When, then, he gives commercial paper, he does so subject to the same liabilities as the non-commercial public.

Upon these facts alone, then, Jack could not have been adjudicated a bankrupt, if resistance had been made to the order of adjudication.

Should the petitioners, who were judgment creditors, have been admitted to make such resistance? They are conceded to be creditors; it is admitted that they would be subjected to damage by the adjudication; it is admitted that the petition for adjudication was filed by collusion between the bankrupt and the petitioning creditor. We think this makes a strong case for allowing the intervention of these creditors, and they should have been allowed to intervene unless there exists some positive rule either of the statute or General Orders in bankruptcy which would prevent. I know of no such rule.

In the case of the Boston, Hartford and Erie Railroad Company, tried on petition of review before Woodruff, Circuit Judge, and reported in 9 Blatch., 101; 6 N. B. R., 209; it was held that a petition in involuntary bankruptcy was not a mere suit *inter partes*, but rather partook of the nature of a proceeding *in rem*, in which any actual creditor had a direct interest, and that a party claiming to be a creditor, and who was able to satisfy the court that he was a creditor, and that his purpose was a meritorious one, ought to be allowed to intervene and object to the adjudication of bankruptcy. The petitioning creditor loses no right by this practice, for if a proper case is made, his debtor will be adjudicated a bankrupt.

I am satisfied with the reasoning of the judge in that case, and think it is an authority entitled to weight.

I am therefore of opinion that the District Court erred in refusing to allow the creditors of Jack to intervene and

object to the adjudication in bankruptcy, and that on the facts as disclosed by their petition for leave to intervene, Jack ought not to have been adjudged a bankrupt.

The adjudication will, therefore, be reversed, as well as the order refusing to allow the said creditors of Jack to intervene to object to the adjudication.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where the assignee petitions for an order that the bankrupt pay over to him the proceeds of a mortgage negotiated two days before filing the petition, *held*, that the bankrupt was entitled to retain therefrom :

First. The amount paid his counsel for preparing his petition and schedules.

Second. Such amount as the assignee should determine to be necessary for the temporary support of himself and family, not exceeding, with his furniture and other articles, the sum of five hundred dollars ; but that he was not entitled to retain the probable expenses of procuring his discharge.

In re JAMES THOMPSON.

On petition by the assignee, for an order that the bankrupt pay over to him the proceeds of a certain mortgage, negotiated by the bankrupt prior to his adjudication.

Thompson was adjudicated a bankrupt upon his own petition, on the 10th of June, 1875. Two days prior to this, and upon the same day the petition was drawn and verified, Thompson raised one thousand dollars, by a mortgage upon certain real estate, of which he paid one hundred and ten dollars to his counsel for drawing his petition and schedules, and the residue to his wife. The assignee petitioned for an order that he should account for and pay the same over to him. It was not disputed upon the argument, that the money was still under the control of the bankrupt.

Mr. F. H. Lewis, assignee, in person.

Messrs. Eldredge & Walker, for bankrupt.

Brown, J.—By Section 5044, the title of the assignee relates back to the commencement of proceedings in bankrupt-

cy. As the money was obtained by the bankrupt prior to the filing of his petition, there can be no doubt that the assignee is entitled to it, under the provision of the above section, unless, by virtue of some other provision of the law, the bankrupt may devote it to other purposes.

First. As to the item of one hundred and ten dollars, paid counsel for drawing the petition and schedules, it is claimed that as the payment was actually made at the time the services were performed, the bankrupt cannot be compelled to repay the amount to the assignee, notwithstanding the fact that his counsel was not entitled to priority of payment from the assets of the estate. It was held by this court in the case of Frederick Gies, 12 N. B. R., 179, that attorneys of a voluntary bankrupt are not entitled to payment from the assets, as preferred creditors, for their services in preparing the petition and schedules; but it was intimated that the attorney might demand and receive a reasonable compensation before rendering his services, and that the payment therefor would be valid. Upon further reflection, I am satisfied that the bankrupt has a perfect right to employ counsel for the purpose, and if necessary to raise the money and pay him, and that such payment ought not to be regarded as a preference, or as made in fraud of the act. The preparation of the petition and schedules is frequently a work of considerable difficulty. It might be impossible for the bankrupt to prepare them himself, without the employment of competent counsel, and he thereby be prevented from having himself adjudicated as such. The entire bankrupt system is based upon the theory that a business man, finding himself insolvent, ought to make public announcement of the fact, and have his property distributed equally among his creditors. The creditors themselves are interested in having their debtor declared a bankrupt, and in having a full disclosure of his debts and assets.

As the payment in this case was made at the time the services were rendered, I see no ground upon which it can be claimed as a preference. An insolvent person is not debarred by his insolvency from making necessary purchases and pay-

ing for them on the spot. I see no difference in this regard between a payment for professional services and the payment of a grocer's or butcher's bill. Both are equally meritorious. Had the service been performed on credit, and the money afterward paid to counsel, the question of preference might have arisen; but I see in this case nothing more than the purchase of professional services, and the immediate payment therefor. I think the authorities fully sustain this position. See *In re* Rosenfield, 2 N. B. R., 117.

Second. It is claimed that the bankrupt is also entitled to deduct from this amount the necessary expenses of procuring his discharge. The considerations above adduced do not apply to services of this nature. The creditors have no possible interest in having their debtor discharged. The debtor has no more right to reserve the cost of professional services to be rendered after his adjudication than to reserve money for any other future purpose unconnected with the support of his family. I must hold this defense cannot be maintained.

Third. The bankrupt also claims the right to reserve money enough to pay the expenses of his family for a reasonable time, and until he can again establish himself in business. Section 5045 exempts from the operation of a conveyance to the assignee "the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, but altogether not to exceed in value in any case the sum of five hundred dollars." This exemption may undoubtedly include provisions and such other articles, not being land or luxuries, as are necessary for the maintenance of a family. Whether it may include money has been much mooted, and the decisions are in irreconcilable conflict. All the authorities upon this subject, so far as I am acquainted with them, are collated in the opinion of Judge Lowell, of the District of Massachusetts, in the case of Ira Hay, 7 N. B. R., 344, and the conclusion reached, that the assignee may designate a sum of money as necessaries, under the statute. With

much doubt whether the rule of *ejusdem generis* ought not to be applied to exclude from the category of necessaries everything which is not actually used in housekeeping, I have come to the conclusion that it is more consonant with the spirit of the Bankrupt Law, and with the modern policy of the several States upon the subject of exemptions, that this clause should receive the liberal construction claimed by the bankrupt. The same word similarly used in the Act of 1841, was held by Judge Story, in the case of B. B. Grant, 2 Story, 315, to include money necessary for the temporary support of a family. It is hardly just to say that one man who has laid in a supply of fuel and provisions shall be entitled to more consideration than another who has been equally unfortunate but less provident; and that the creditors of the latter should have the benefit of the money which he might have expended in the purchase of the same articles. I think, too, the use of the word "necessaries" in the admiralty law, as including the money used in the purchase of necessaries, furnishes a strong analogy.

In all cases, however, where it is held that money may be set apart, the necessity—that is, whether the condition and circumstances of the bankrupt require the exemption of money—is first to be determined by the assignee, subject to the final decision in the court upon exceptions. In a note to Hay's case it appeared there was evidence tending to show that the bankrupts had earned something since the bankruptcy; that two of them had no family depending upon their exertions, and were skilled workmen; that the wife of the third had some little property, and that the assets were small compared with the debts. The judge sustained the action of the assignee in refusing the exemption. In another case it appeared that the bankrupt and his family had suffered much from illness; that a large part of their clothing and bedding had been destroyed through fear of infection; that he was an old man, and his assets were considerable. An allowance was thereupon ordered. As it does not appear in the present case whether, since the adjudica-

tion, the bankrupt has been engaged in profitable employment, or has been able to support himself and family, I think the question of exempting money must be left primarily to the judgment of the assignee upon the best information he can obtain, subject to the review of the court.

It results that an order must be made requiring the bankrupt to pay over to the assignee the amount realized by the mortgage, less the sum of one hundred and ten dollars paid to his counsel for services in preparing the petition and schedules, and less such further sum as the assignee may determine to be necessary for the temporary support of the bankrupt and his family, not exceeding, with his furniture and other articles, the sum of five hundred dollars.

UNITED STATES CIRCUIT COURT—LOUISIANA.

A right of action is barred by the limitation of two years, although the assignee did not discover the right until after the expiration of the two years.

The limitation of two years applies to those causes of action which existed before the bankruptcy, and came to the assignee by the assignment, as well as to those which arise after the bankruptcy.

NORTON, Assignee, v. *DE LA VILLEBEUVE.*

ACTION at law for the recovery of certain real estate in the city of New Orleans.

Messrs. E. C. Billings, Wm. Grant and *Allan C. Story,* for plaintiff.

Messrs. C. Roselius and *Alfred Phillips,* for defendant.

WOODS, J.—This is a petitory action brought to establish title to and recover possession of certain lots of ground in the city of New Orleans of which defendant is in possession, claiming title. The parties have filed their written stipulation waiving a jury, and submit the cause to the court on the issues of fact and law.

The defendant pleads, among other defenses, the statute

of limitations of two years, found in the 2d Section of the Bankrupt Act. The clause of the section on which defendant relies is in these words: "But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall have been brought within two years from the time the cause of action accrued for or against such assignee; provided, that nothing herein contained shall restore a right of action barred at the time such assignee is appointed."

The plaintiff and defendant both claim title from the same source, to wit, from Person, the bankrupt; the plaintiff by virtue of his office as assignee, and the transfer to him of all the property of the bankrupt, and the defendant by virtue of a sale made by order of this court before the bankruptcy of Person, on a mortgage executed by him upon the property in dispute.

The bar of the statute of limitations relied on by defendant, seems to be perfect and effectual, unless there is some circumstance pleaded and proven to take the case out of the operation of the statute; for on the 9th of March, 1868, Person, under whom both parties claim, was adjudicated a bankrupt, and the plaintiff was appointed his assignee on the 22d day of April, 1868, and this action was not brought until the 21st day of August, 1871, a period of three years and four months, lacking one day, after the appointment of the assignee.

The plaintiff claims, however, to be relieved from the bar of the statute by the averment which he has sustained by proof, that he did not discover said property and his right thereto until about the 1st day of July, 1871, one month and twenty-one days only before the commencement of this action.

The question is therefore presented, Does the fact that the plaintiff was ignorant of his rights relieve him from the bar of the statute? No case has been cited sustaining the

plaintiff's view, nor do I think any can be found. If it had been the purpose of the law-making power, that the limitation should begin to run from the time the plaintiff discovered his right of action, and not from the time his right of action accrued, it would have said so in unmistakable terms. To introduce such an exception into the statute, would be an act of legislation on the part of the courts, and would, it seems to me, be directly contrary to the policy of the Bankrupt Act, which looks to the speedy settlement of the bankrupt's affairs. It might be equitable in some cases that this view of the plaintiff should prevail, but it is not competent for the courts to engraft other exceptions on the statute, even on the ground that they are within the equity of those expressed. (*Bank of Alabama* v. *Dalton*, 9 Howard, 522.)

On this point, the case of *McIver et al.* v. *Ragan*, 2 Wheaton, 25, is pertinent. The plaintiffs brought ejectment for five thousand acres of land in possession of defendant, and gave in evidence a grant from the State of North Carolina, comprehending the lands for which the suit was instituted. The defendant claimed under a junior patent and a possession of seven years, held by Ragan, which, under the statutes of North Carolina and Tennessee constituted a bar to the action.

To repel this defense, the plaintiffs proved that no corner or course of the grant under which they claimed, was marked, except the beginning corner; that the beginning and nearly the whole land and all the corners except one were within the Indian Territory. These lands were not ceded to the United States until 1806, within seven years from which time the suit was brought. The land in possession of Ragan, however, did not lie within the Indian Territory. Upon these facts the plaintiffs requested the Circuit Court to charge the jury that the act of limitations would not run against the plaintiffs for any part of the tract, although outside the Indian boundary, until the Indian title was extinguished to that part of the tract which included the beginning corner, and the lines running from it, so as to enable them

to survey their land and prove the defendants to be within their grant. This instruction the court refused, and the cause was taken to the Supreme Court on writ of error, when Marshall, Chief Justice, delivered the opinion of the court. He said: "The case is admitted to be within the act of limitations of the State of Tennessee, and not within the letter of the exceptions. But it is contended that as the plaintiffs were disabled by statute from surveying their land, and consequently from prosecuting their suit with effect, they must be excused from bringing it, and are within the equity though not within the letter of the exceptions.

"The statute of limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under color of title believed to be good. The possession of defendants being of lands not within the Indian Territory and being in itself legal, no reason exists as connected with that possession why it should not avail them and perfect their title as intended by the act. The claim of the plaintiffs to be exempted from the operation of the act is founded, not on the character of the defendants' possession, but on the impediments to the assertion of their own title.

"Whenever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception. It would be going far for the court to add to those exceptions." The judgment of the court below was affirmed.

A discharge under an insolvent law does not take from the debtor the protection which is afforded by the statute, even by virtue of the equity of the exception of being "beyond seas," or "out of the State," although the reason why such absence of a defendant excuses the plaintiff from prosecuting is, that he cannot be reached by process of the courts. (Angell on Limitations, 487.)

It was contended in the Supreme Court of New York that the cause came within the equity of the statute; that the

defendant had been discharged under an insolvent act, and that the discharge would prevent the statute from running against an action of assumpsit upon a contract made before the passage of the insolvent act, and the money not falling due until after the debtor's discharge. But the court held otherwise, and said: "Though the defendant's virtual protection from prosecution by the discharge produces the same result as his absence from the State, yet we are not warranted by any rule of construction in deciding that any cause which produces the same effect as the one mentioned in the act comes within it. It is not for the court to extend the law to all cases coming within the reason of it, so long as they are not within the letter. It has been holden that no exception can be claimed unless expressly mentioned." (*Bucklin* v. *Ford*, 5 Barb., 393.)

So A B made his promissory note on the 17th of April, 1812, in favor of C D, who indorsed it to E F. An Act of Assembly was passed in Pennsylvania, on March 13, 1812, which was in fact a Bankrupt Law. On the 31st of March, 1817, the Supreme Court of Pennsylvania held that said act was constitutional, and a discharge under it a bar to a recovery. The case on which the decision was made was removed to the Supreme Court of the United States, and there reversed on February 13, 1821. More than six years after the cause of action arose on the note, E F, the indorser, brought a suit on it against A B, the maker, and on a case stated, the following question was submitted for the opinion of the court: "Did the act of limitation run against the plaintiff while the Act of March 13, 1812, was held by the Supreme Court of Pennsylvania to be constitutional?" It was held by the court that these circumstances did not stop the running of the statute. (*Hudson* v. *Carey*, 11 Sergt. & Rawle, 10; Angell on Limitations, 487.)

It would be unreasonable to require a case more directly in point to the question under discussion. The principle decided in the cases cited disposes of the claim of plaintiff.

He has been under no disability to sue; the courts have

at all times been open to him, and the defendant at all times liable to be sued by him. The limitation provided by the statute had run against the plaintiff before he brought his action. He falls within the terms of the act, and the law makes no exceptions. The court cannot legislate for his benefit and make an exception in his favor, when the law has made none.

I am of opinion, therefore, that the plea of the limitation in the 2d Section of the Bankrupt Act is a good and sufficient answer to the plaintiff's cause of action. Upon that issue the finding and judgment of the court is for defendant.

Upon the rendition of the foregoing decision, the plaintiff entered a motion for a new trial, on the ground that the court erred in the effect given to the limitation of actions in the last clause of the 2d Section of the Bankrupt Act. The theory now urged is that the limitation only applies to new causes of action, arising in favor of the assignee after the bankruptcy, and not to those which had existed before the bankruptcy and had come to the assignee by the assignment; as, for instance, damages for trespass to the property in the hands of the assignee, or a conversion of the property assigned to him, and such like cases. To support this view, attention is called to certain provisions found in the 14th and 16th Sections of the Bankrupt Act. The 14th Section declares that the assignee "may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity pending at the time of the adjudication in bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with like effect as they might have been prosecuted by such bankrupt."

The 16th Section provides that "the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made."

The argument is, that by applying to the assignee the brief limitation of two years, we do not give him the same

remedy which the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made, and that we do not allow him to sue for and recover the estate, debts, and effects of the bankrupt in the same manner and with like effect as they might have been if sued for by the bankrupt.

I think this construction claimed for the limitation of the 2d Section of the Bankrupt Act is too narrow. The general policy of the Bankrupt Act is to hasten the final settlement of the bankrupt's affair. The proceedings in bankruptcy are speedy, and in many cases summary. In the Bankrupt Act of 1841, it was provided (5 Stat., 447, Section 10), that "all the proceedings in bankruptcy in each case, shall, if practicable, be finally adjusted, settled, and brought to a close by the court within two years after the decree declaring the bankruptcy." While this provision is not re-enacted by the Bankrupt Act of 1867, it is clear that the policy of the law is the same as if it were. By the 28th Section of the act, provision is made for a final dividend at the end of six months from the adjudication, unless an action at law or suit in equity be then pending, or unless some other estate and effects of the debtor afterwards come to the hands of the assignee; in which case the assignee shall as soon as may be convert such estate or effects into money, and within two months thereafter, the same shall be divided in like manner. We think the limitation in the 2d Section was enacted to carry out this policy of a speedy settlement of the bankruptcy.

In order to arrive at the true interpretation of the law upon the question in hand, the provisions of the 2d, 14th, and 16th Sections of the act must be construed together, as if they were all contained in the one section, and stood side by side. So considering them, their meaning appears plain, and the effect of the three sections is this: the assignee may sue for and recover the estate, debts, and effects of the bankrupt in his own name, and have like remedy to recover all said estate, debts, and effects as the bankrupt might have if the decree in bankruptcy had not been rendered and no

assignment had been made, provided his suit for that purpose is brought within two years from the time the cause of action accrued to him. This construction gives reasonable effect to all three sections, and upholds the policy of the act looking to the rapid settlement of the bankruptcy. The clause in the Bankrupt Act of 1841 (5 Stat., 446, Section 8), corresponding to the provision in the 2d Section of the Law of 1867, under consideration, is in these words: "And no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property or rights of property aforesaid, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall have first accrued." This phraseology excludes completely from the Act of 1841 the construction which plaintiff attempts to put upon the Act of 1867, for by the Act of 1841, it is clear that if the cause of action accrued before the bankruptcy, the action must be brought within two years from the decree, and if after the bankruptcy, within two years from the time the action accrued. We think it clear that the effect of the provision under consideration is the same, and that the change in the words used in the Act of 1867, was not intended to accomplish an entire and radical change in the effect of the limitation.

The consequences which must follow the construction claimed by the plaintiff are so absurd as to demonstrate its incorrectness. Thus: no cause of action accrues upon a promissory note until its maturity; from that date only the statute of limitations begins to run. Now, according to the theory of plaintiff, if a promissory note, the property of the debtor, falls due the day after the bankruptcy, the assignee must bring his action within two years, but if it falls due the day before the bankruptcy, he is allowed the full term of the general limitation laws, six, ten, or fifteen years, as the case may be, in which to bring his action.

Such, we are convinced, is not the true interpretation of the law. In our view, on all matured claims and demands,

the cause of action accrues to the assignee at the date of the assignment; all others from their maturity or at the time when an action will lie; and he must sue within two years from these dates respectively. We are therefore unable to see any error in our finding and judgment, and the motion for a new trial must be overruled.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

If a person loans money for the use of a firm, and accepts the note of one partner, he cannot maintain an action against the firm.

If a party who accepts the note of one partner is ignorant that the loan is for the firm, he cannot maintain an action against the firm after he has recovered a judgment against the partner on the note.

A judgment against partners and others jointly, is a several claim as against the bankrupts, and cannot receive a dividend from the joint estate.

If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment.

In re HUGH T. HERRICK and GEORGE HERRICK.

WALLACE, J.—This is an application by a creditor of the separate estate of Hugh T. Herrick, to have the proof of debt against such estate filed by one Brooks expunged. By the petition and answer of the parties, it appears that Brooks proved a judgment recovered against the bankrupts and four others, and assigned to him, as a debt against the bankrupts jointly, and after a dividend had been declared, he proved the same judgment as a debt against the separate estate of Hugh T. Herrick, alleging in the second proof that the judgment was recovered upon a note made by Hugh T. Herrick individually, and indorsed by George Herrick.

Brooks now insists upon his right to a dividend from both the joint estate and the individual estate of Hugh T. Herrick, and avers that the note upon which the judgment was obtained, though made by Hugh T. Herrick, and indorsed by George Herrick, was made and negotiated for the benefit of the firm of which they were partners, and that the

firm actually received the avails of the note. Brooks contends that by reason of these facts, the bankrupts were liable to him both jointly and severally, and that he is, therefore, entitled to prove against both estates; while on the part of the petitioner, it is insisted that Brooks had his election as to which estate he would resort, and by proving against the joint estate exercised that election, and is now precluded from resorting to the individual estate. Numerous adjudications in the courts of the United States affirm the right of a creditor who holds the obligation of a partnership, and of one or of all of the partners severally for the same debt, when the several obligation is distinct from and cumulative to the joint obligation, to prove in bankruptcy against both the joint and individual estates. In England, the creditor in such case is put to his election, though the rule has been repeatedly reprobated by her judges as founded upon no sound principle or analogy. (9 Ves., 124; 10 *Id.*, 109.) It has been repudiated in this country, because at law a creditor has always been permitted to pursue all his remedies upon a joint and several obligation for the same debt until he obtains satisfaction in full, and because his right to do so is contemplated by the parties to the obligation when it is created; the remedy being the controlling consideration which gives rise to a joint and a several security for the same debt.

None of these reasons, however, sanction the position assumed by the creditor here. When the note which was the foundation of the claim was negotiated, if the person who advanced money upon it knew that it was for the firm, inasmuch as he accepted the individual liability of the member who signed it as maker, he could not have maintained an action against the other partner. It is not alleged that he did not know that the note was made for the benefit of the firm. But if he had been ignorant that the maker was, in fact, the agent of the firm, he could have maintained an action against all the partners. Instead of bringing such an action, he brought one against the partner who signed only,

and obtained judgment in that action. His right of action upon the original consideration of the note merged in the judgment, and thereafter he could not have maintained an action against the other partner upon it.

Peters v. *Sanford*, 1 Denio, 224; *Robertson* v. *Smith*, 18 John., 459; *Olmsted* v. *Webster*, 8 N. Y., 413. If his right to prove, rests, therefore, upon the recognition by this court of his remedies at law, he has no remedy against both estates. If it rests on the theory that the intention of the parties should be effectuated, here it was not the intention that the person who advanced money upon the note, should have the security of the joint and also of the several liability of the partners. The intent of the partners, as evinced by the note, was clearly that he should have only their several obligations, the one as that of maker, the other as that of indorser. The attempt of the creditor here, is one to obtain satisfaction from the joint estate and from the individual estate, of a demand which was originally either several or joint, but was never both several and joint. His position is not sanctioned by precedent, or by any analogy or principle; it would be repugnant to common honesty to sanction it, for, if his attempt were successful, it would be a fraud upon the other creditors of the bankrupt, who are all as much entitled to double dividends upon their debts as this creditor is to a double dividend on his. I sincerely regret that I am unable to hold that he is concluded, by his action, from receiving a dividend from the individual estate.

Though he attempted to prove his claim against the joint estate, the proof deposed to and filed by him, shows upon its face a claim against the bankrupts severally and not jointly. While the deposition avers that the bankrupts are jointly indebted to him, it sets out as the particular statement of the demand, a judgment recovered against the bankrupts, and four other persons jointly. The averment of the facts and not of the legal conclusion must control to determine whether the claim is upon a joint or upon a several demand. The judgment described is not an obligation joint as

to the bankrupts, but joint as to them and four other persons. It constitutes a debt against each, and against both, but not a joint debt. If an action were brought upon it, it could not be maintained against the two alone. Even in the case of a joint and several obligation, it is familiar doctrine that the liability is several as to each and joint as to all; it cannot be treated as several as to some of the obligors and joint as to the others; the obligee must proceed either severally against each, or jointly against all.

The liability disclosed in the proof was not one which could be enforced against the bankrupts as a joint liability, and therefore, not one upon which a dividend could be compelled from the joint estate. Of this the assignee and all the creditors had ample notice.

It cannot logically be maintained that Brooks, by proving a debt which, upon the face of his deposition, was one against the bankrupts severally, thereby elected to resort to the joint estate. The dividend declared upon this debt from the joint estate, was unauthorized, and the assignee can now withhold its payment. That Brooks intended to obtain a dividend from the joint estate is not material; the law does not attempt to deal with intent, however culpable morally that intent may be, unless it culminates into some act that is injurious. Here no one could be prejudiced, in a legal sense, by the act of Brooks.

Inasmuch as the second proof was for the same debt as that set forth in the first, it should be expunged.

Order accordingly.

UNITED STATES CIRCUIT COURT—SOUTH CAROLINA.

Where property which is encumbered by liens, is sold at the suggestion of the general creditors, and brings no more than the amount of the liens, it is not chargeable with any costs, except the actual costs of sale.

In re Blue Ridge Railroad Company.

Where property is sold free from a mortgage, the Bankrupt Court has no authority to adjust the claims of the trustee under the mortgage against the *cestuis que trust*, nor to ascertain what is due by him to his counsel.

In re BLUE RIDGE RAILROAD COMPANY.

BOND, J.—It appears from the record in this case that the Blue Ridge Railroad Company is a corporation under the laws of South Carolina, and that on the 20th day of April, 1854, it executed a mortgage of all its property whatsoever, to certain persons therein mentioned, to secure the payment of certain bonds named in said mortgage, and the interest thereon to accrue.

And further it appears, that after the mortgage debt aforesaid became due and payable, and was unpaid, certain creditors of said bankrupt filed a petition in the District Court, asking that the said corporation might be declared a bankrupt, which was accordingly done, and assignees were duly appointed to take charge of the bankrupt.

It appears also that the said corporation, at the time of its adjudication as a bankrupt, had no other property whatever than that covered by the said mortgage, and that the property mortgaged was totally inadequate, when sold, to pay the debt for which it was pledged.

It appears further, that on the 16th of January, 1873, the assignees of the said bankrupt filed a petition in the Bankrupt Court, asking that the property of the corporation, mortgaged as aforesaid, might be sold, and the court directed a sale thereof. At which said sale, one Robert K. Scott, who was authorized by his fellow bondholders to purchase the road in their behalf, became the purchaser thereof, being the highest bidder therefor.

Prior to said sale, the Bankrupt Court made an order directing James Simons, Esq., as special master in the case, "to inquire and report what compensation the trustees and assignees were entitled to, by way of commissions, expenses incurred, services rendered and to be rendered up to and including the sale proposed, and also to inquire and report what fees the counsel for the trustees and assignees were

entitled to, and out of what fund payment should be made therefor." Under this order, the special master filed his report of the 12th of March, 1874, by which he allowed to the assignees of the bankrupt certain commissions, fees, and expenses for themselves and their counsel, and to the trustees under the mortgage, another large sum of money by way of commissions, counsel fees, and expenses, amounting in all to about thirty thousand dollars, and he directs or recommends that the larger part of these payments be made out of the proceeds of the sale of the mortgaged property, and bases his estimate upon the supposition that the road is worth two hundred and fifty thousand dollars.

The property of the railroad sold at the sale for fifty thousand dollars.

From the order making the reference to Special Master Simons, and from the order overruling the exceptions to his report and confirming the same, the petitioners here file their petition, asking the aid of the supervisory jurisdiction of the Circuit Court.

It is plain from the record in this case, that at the time of the filing of the petition in bankruptcy, the bankrupt company had no property, the sale of which would produce anything for its general or unsecured creditors. All that it owned was mortgaged greatly beyond its value.

The only justification of the petition of the assignees for the sale of this property by the Bankrupt Court, is, that they supposed it would realize something for the general creditors. This the sale did not do, and every one concerned in the proceeding had reason to know it would not. When a Bankrupt Court, at the suggestion of the general creditors, authorizes the sale of property encumbered by liens, and the proceeds of sale amount to no more than the claims of the lien creditors, it has no control over the fund but to pay it to such lien creditors, and it is not chargeable with any costs in the bankrupt proceeding, except the actual costs of sale. The fund is sacred, and is devoted to the payment of the lien creditors whose property has been sold, and they are chargeable with no other

or further costs than they would have incurred had they sold the property under their liens. The assignees in this proceeding were acting not for the benefit of the bondholders who were secured by mortgage, but for the general creditors of the bankrupt. By what rule of equity can the lien creditors be required out of their funds to pay the expenses of a litigation which was solely for the benefit of the general creditors? Both they and their counsel must look to the general assets of the bankrupt estate for payment of their claims, if they be entitled to payment at all.

Nor can the allowance by the special master to the trustees and their counsel, which was confirmed by the Bankrupt Court, be permitted.

The District Court, when it ordered the sale of the railroad property, was acting solely for the general creditors. When the property was sold under its order, and it was found there was nothing in hand belonging to them, its sole duty was to ascertain who the lien creditors were, the priority and amount of their claims, and to pay over to them the proceeds of the sale.

It had no authority in this proceeding to adjust the claims of the trustees under the mortgage against their *cestui que trusts*, nor to ascertain what was due by trustees to counsel.

The mortgaged property in the hands of the Bankrupt Court, was and is bound for nothing but for the lawful charges for the administration of that property in that court.

The sale not being objected to, and no motion being made to set it aside, will be allowed to stand, but the Circuit Court will pass an order revoking the order of the District Court, referring this cause to Special Master Simons for report, and reversing the order of the District Court confirming the report of said master, and will direct that this cause be remanded to the District Court with directions to ascertain what were the actual costs incurred in the sale of said mortgage property, as determined by the Bankrupt Law, and which, in accordance with this opinion, are properly chargeable to the proceeds of this sale.

UNITED STATES DISTRICT COURT—MAINE.

A claim for compensation for the destruction of a vessel by a Confederate cruiser, equipped and sent out in England, through the negligence of the British Government, is susceptible of a transfer that may be sustained in equity.

A mere agreement to give what may be realized from a claim, is a promissory arrangement, and does not constitute a complete and perfect gift.

JOSEPH WILLIAMSON et al., Assignees, v. *JOSIAH A. COLCORD and WIFE.*

Joseph Williamson and *T. B. Reed*, for complainants.
Wilson & Woodard and *C. Hale*, for respondents.

Fox, J.—This cause arises from the depredations committed on our commerce by the rebel cruiser Florida, in March, 1863.

At that time the bankrupt, Josiah A. Colcord of Stockton in this district, was master and a part owner of the bark M. J. Colcord, which was destroyed by the Florida on the 27th of March while on her voyage from New York to Cape of Good Hope. The interest of said Colcord, as master and owner, is stated to have been something over eleven thousand dollars, for the recovery of which sum, under the Geneva award, a petition in behalf of Mrs. Colcord is now pending before the proper tribunal at Washington.

Captain Colcord, some time after his return to the United States, became a member of the firm of Colcord, Berry & Co. The firm proved insolvent, and having been adjudged bankrupts, the complainants were chosen and qualified as assignees in bankruptcy of said estate, and they have also filed their petition at Washington for the allowance to them of this claim for damages, for the benefit of said Colcord's estate, and have instituted this bill to have the respective rights and interest in the award, which may be made in this behalf, ascertained and determined between them.

The respondents in their answer allege that in September,

1863, Captain Colcord, "in consideration of love and affection, and for other good and sufficient considerations, did give, assign, transfer, and set over to his wife, said Martha J. Colcord, said claim, arising from the loss of said bark, and that he has not since that time had or pretended to have, any ownership or control over said claim, but that said Martha J. Colcord has exercised such ownership and control, and has always represented and held herself out as the owner of such claim."

Under the laws of this State, husband and wife may contract directly with each other; but when payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her, without a valuable consideration paid therefor, it may be taken as the property of her husband, to pay his debts contracted before such purchase. (R. S., 1857, Chap. 61.)

In *Mitchell* v. *Winslow* (2 Story, 630), Mr. Justice Story decided that the assignee takes the property of the bankrupt, subject to all legal and equitable claims of others, and is affected by all the equities which can be urged against the bankrupt. This principle has since been reaffirmed scores of times, by the various courts administering the Bankrupt Law, including the Supreme Court of the United States (*Cook* v. *Tullis*, 9 N. B. R., 433; 18 Wall., 332); and if the bankrupt is estopped, his assignee is also estopped.

In 1863 the bankrupt was free from debt. I am therefore brought to the consideration of this cause, as if the parties were husband and wife, each claiming the benefit of the award; and the rules of equity which would be applicable if the case was pending between those parties must govern and control my decision in the present suit.

The subject matter of this controversy is of that uncertain and indefinable character, that the researches of neither counsel nor court have discovered any authorities directly applicable, and which are decisive of the questions here presented. The claim was not against a foreign government for indemnity for damages occasioned by its authority, as was the case of

Comegys v. *Vasse* (1 Pet., 193), but it is one degree more remote and contingent, being for recompense for injuries suffered from this rebel cruiser, which, as our government contended, had been permitted, through the negligence of the British authorities, to be constructed and equipped and to depart from British territory to accomplish its piracies; and by reason of such negligence, indemnity was demanded from the government of Great Britain for the damages thus inflicted on our commerce.

Our own government was not responsible, and no valid claim could be made upon it for redress by the sufferers. Great Britain had not directly committed or authorized these depredations to be made, and it was only on the ground of her failure to comply with her obligations under the rules of international law, that any redress could be sought against her for the wrongs thus sustained. It is difficult, therefore, to imagine a claim of a more precarious nature, wholly dependent on the willingness of Great Britain to acknowledge and make satisfaction for the consequences of her misdoings, or submit the same for decision to the arbitration of others, by which latter course her accountability was subsequently established.

It is claimed that, being of this character, not manifested by any evidence whatever of a documentary nature, but the whole claim resting and being in mere expectancy and possibility, it was not susceptible of a donation, and therefore, that there could be no valid gift of the same to Mrs. Colcord by her husband. It is certain that there was nothing in his control or possession, which could be so given and delivered as to constitute, at law, a complete and perfect gift, and confer a legal valid title to the donee; but equity recognizes many rights, expectancies, and possibilities, as being the subject matter of a gift or transfer, so far as to confer an equitable interest therein, which a court of equity will acknowledge, sustain, and protect, as sufficient to divest the donor of any rights thereto, provided he has done all that was requisite to perfect and carry out his intentions. (3 White & Tudor, Lead.

Cases Eq., 307, 308, 343, 344, 3d Amer. Ed.) In the light of the authorities therein referred to and commented upon, I am inclined to hold that the subject matter of the present controversy was such that equity would sustain and protect the rights and claims of the wife thereto, if all was done that was requisite to accomplish the purpose of the husband to vest the same in his wife.

It is necessary, therefore, to critically examine the evidence, and see what was said and done between the parties at the time of this alleged gift, as it is not claimed that any writings of any kind were executed by either party, or that there was then or at any subsequent time, any symbolical delivery of anything whatever, either documentary or otherwise.

The answers of both the bankrupt and his wife state that this transfer was made in consideration of love and affection, and for other good and sufficient considerations; there is no averment that there was any valuable consideration for the transfer, and although the wife and some of the other witnesses state that she mentioned at the time, as a reason for the gift, that she had let her husband have some money to go into this bark, it is evident from all the testimony, that whatever he may have received from her was his own property, which had been remitted by him to her for the support of his family, and that the balance which remained unexpended, was received and paid out by him on the bark's account; this money never in any way became her property, and at the argument, her counsel properly abandoned all claim or right thereto in her behalf, and conceded that no advantage or support could be derived therefrom, and that the only consideration for the gift was that growing out of the relation existing between the parties, which, while it is not either at law or in equity deemed a valuable consideration, yet is always recognized both as of a good and meritorious nature.

Captain Colcord, in his deposition taken in this case, testifies that in September, 1863, he was offered for his claim twelve per cent. of the amount. That he consulted with his

wife in relation to accepting this offer, to which she was much opposed; that she remarked, "that as the vessel was named for her, and she had let him have some money to put into the vessel, he had better give it to her;" and his further statement is as follows: "I told her that I would give the claim to her cheerfully, and that she was welcome to all she could get from it." On being asked by his counsel to state further what was said, his language was, "I give you cheerfully all the claim; that she was welcome to every dollar she could get for the claim." The difference between these two statements is, that the latter imports a present gift, while the other is rather of a promissory nature of what he would do for her in the future. Mrs. Colcord's statement is substantially in accordance with the latter statement of her husband, and she adds that her two daughters were present in the room at the time, and she said to them: "Girls, remember that your father has given me these claims." The testimony of the daughters, who were then quite young, one, who has since married, being then only fifteen, substantially agrees with the mother's statement, and they also testify that Captain Colcord frequently spoke in the family of the claim as his wife's, and would allude jokingly to the large sums she would receive from it.

Opposed to this testimony is the statement of Captain Colcord in his deposition given before the Register, in July, 1873, in which he says, "he gave the claim to his wife shortly after the vessel was burnt, but he did not recollect whether it was done in writing or not." The evidence of Mrs. Berry, a sister-in-law of Mrs. Colcord, tends to establish from the admissions of Mrs. Colcord, that her husband, long subsequently to this alleged gift, undertook to manage and control the disposal of this claim, and that the wife made no objection thereto. Mrs. Berry testifies that at one time Mrs. Colcord told her "that her husband had sold the claim;" at a subsequent time Mrs. Colcord said "that they had had a talk of selling but did not sell." In the last conversation Mrs. Colcord said "that the witness was mistaken about hear-

ing her say that Captain Colcord had sold the claims positively; that he talked of selling them, or had an idea of it." Alexander Staples states in his deposition, that Captain Colcord told him, in the presence of Mrs. Colcord, "that he had sold out his claim—sold to Western parties." Mrs. Colcord then said: "You have just owned up," and seemed to express some surprise that he had not told her before.

When we consider the failure of memory of Captain Colcord, in his not being able in 1873 to remember whether he had or not executed any writing to perfect this gift, and also that his first statement in his deposition was, that he told his wife he would give her the claim, and the subsequent admissions of both him and his wife, that he had exercised acts of ownership over it, by claiming that he had sold it, or talked of selling it, it may not be an unreasonable conclusion for the court to draw, from all the evidence, that all that was in fact declared by him at that time, was a purpose and intent on his part to give to his wife whatever he might thereafter realize from this claim, and that he was still to retain his control over it, and enforce it in such manner as circumstances might subsequently render proper, and that it was not his intent to cast upon her the whole responsibility of prosecuting and maintaining the claim in the future, as might be requisite. All the facts to sustain the claim were peculiarly within his own knowledge, and it would be much less difficult for him to procure the required proof when wanted. And the language then employed, without any great restraint, may be considered of a promissory nature, simply, as he first expressed it, "that he would give the claim to her," instead of an actual present gift, as it is quite evident the examining counsel understood was important should be established. If the fair import of what then took place was a mere agreement and promise on his part, that when he should realize the amount he would give it to his wife, it would remain simply a promissory arrangement, and would not constitute a complete and perfect gift, and would not be obligatory on him or his assignee in bankruptcy in a court of equity.

The case of *Jones* v. *Locke*, L. R., 1, Ch. Ap., 25, is certainly a stronger one than the present, as establishing a gift. In that case, a father put a check of nine hundred pounds into the hands of his son, nine months old, saying to his nurse: "Look you here; I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it." His wife said: "Don't let him tear it;" and he answered: "Never mind if he does; it is his own, he may do what he likes with it;" he then took it away, saying to the nurse: "I am going to put this away for my son," and he locked it in his iron safe. Shortly after, he died, and the check was found amongst his effects. It was held by Lord Chancellor Cranworth that there had been no gift to, or valid declaration of trust for the son.

Waiving this view of the evidence, and conceding that the intention of Captain Colcord at the time was to divest himself of all right of redress which he might have for these losses, and to vest the same in his wife, I am, nevertheless, of the opinion that as there was no valuable consideration therefor, and no delivery of any written transfer or document of any kind, all resting on mere words on his part, he had not by what then took place perfected and accomplished his purpose, that there was still remaining the *locus pœnitentiæ*, and that he might at any time afterwards, before the wife had received the fruits of the intended gift, convey or transfer the same to any other party, or could enforce his claim before the courts created for that purpose, in his own behalf and for his sole benefit, and that such right passed to his assignee in bankruptcy.

Where the assignment, from its own nature or that of the subject matter assigned, does not pass the legal title, it can only be good as an executory contract, and requires the assent of both parties and the support of a consideration. In the present case, the only consideration arose from the relation of the parties, husband and wife, which is a good and meritorious, but not a valuable one. (*Edwards* v. *Jones*, 1 M. & Craig, 226.) In *Ellis* v. *Nemmo*, Ll. & G., 333, Lord Chancellor Sugden held that the meritorious consideration of

providing for a child was sufficient to authorize a court of equity to enforce an executory contract for that purpose against the donor, but this decision was subsequently abandoned by him, and was not approved by other equity tribunals, and "it is now the settled law of England, that an executory agreement founded on a meritorious consideration, will not be enforced against the donor." (Perry on Trusts, 74.)

Lewin on Trusts, p. 99, states: "At the present day, it seems to be established that even as against volunteers, claiming under the settler, whether with or without any possession *aliunde*, a voluntary agreement, whether under seal or not, whether coupled with a valid trust of other property settled at the same time or not, cannot be enforced on the mere ground of meritorious consideration."

In Perry on Trusts, Section 109, it is said "that the tendency in the United States is to sustain and carry into effect an executory trust in favor of a wife or child, founded on a meritorious consideration, if the instrument is under seal, though the rule is not fully established,and perhaps upon thorough consideration would not be acted upon." On page 81, Mr. Perry says that "the courts say that they will not execute a voluntary executory agreement, unless it is under seal." He cites in support of this, *Kennedy* v. *Ware*, 1 Penn., 445, in which it was decided that "an equitable assignment of a *chose in action* to a daughter by her father, in consideration of love and affection, was void;" and *Caldwell* v. *Williams*, 1 Bailey, Eq., 175, opinion of Harper, Chancellor, who says: "Some agreements, which are termed voluntary, are executed in this court, when made in favor of a wife or children, but these are always agreements by deed or covenant, agreements under seal, which imports a consideration, and renders them valid at law. There is no instance of an agreement being enforced which is not only voluntary in the equity sense of the word, but is also *nudum pactum* at law."

In *Pennington* v. *Gittings*, 2 G. & J., 208, it was held, that a mere executory contract cannot be supported on the consideration of love and affection, and a gift under such circum-

stances cannot be made good in equity. (See also *Dennison* v. *Goehring*, 7 Penn., 175.)

In 1 L. C. in Eq., 332, it is said that "the doctrine appears to be, that there must exist a valid and obligatory contract at law as a preliminary basis to any equitable interference, and then, that equity grants its extraordinary aid, only when there is an actual consideration, valuable or meritorious." (P. 334.) "When, instead of a present gift, or transfer, there is a promise or covenant to give, or a mere expression of an intention that the donee shall have that subsequently, which the donor reserves to himself, or keeps within his control or disposition for the time being, the question becomes one of contract, and a consideration becomes essentially necessary to give force to that which would otherwise be an uncompleted gift; hence the assignment of a debt, not sustained by a consideration or by the delivery of the instrument by which the debt is evidenced, will be invalid both at law and equity (*Carpenter* v. *Dodge*, 20 Vt., 595; *Hitch* v. *Davis*, 3 Md. Ch., 266), unless an instrument of gift be executed and delivered as substitute for the delivery of the evidence of the debt;" in the Maryland case, there was a meritorious consideration, the alleged gift having been made by the father to the daughter, and sought to be enforced against his estate. (*Whittle* v. *Skinner*, 23 Vt., 531.)

In 17 N. J., Ch. 407, the marginal note is, "In equity, where a widow seeks to establish a gift from her husband, in his lifetime, she must adduce evidence beyond suspicion, and nothing less will do than a clear, irrevocable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife.

"To constitute a perfect gift, the donor must part with the possession and dominion of the property, and if the thing be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed."

This being an imperfect gift, it cannot, to carry out the intentions of the parties, be construed as a declaration of trust, so as to make the donor a trustee for the donee. This was so decided by Lord Chancellor Lyndhurst in *Meek* v. *Keitlewell*, 1 Phillips, 342, and he declares that the authorities are conclusive on this question.

It is but simple justice to state that nearly all the authorities on these subjects of voluntary trusts and equitable assignments, will be found collected in Smith & Tudor's notes to Leading Cases in Equity, to the cases of *Ellison* v. *Ellison*, and *Rowe* v. *Davison*. They are carefully analyzed by the learned authors, and the court has been greatly assisted in its examination of this cause by their labors.

The objection was taken to this transfer that it fell within the provisions of Chap. 81 of Acts of 1853, 10 Stat., 170, by which transfers of claims against the United States are made absolutely null and void, unless made and executed in the presence of two witnesses after the allowance of the claim, etc. It is a sufficient answer to this objection, that at the time of the alleged transfer, there was no claim against the United States to be assigned, and the case here is not within that act.

And it has been also decided by the Court of Claims, Lawrence and Crowell's case, 8 Ct. Cl., 253, that the purpose of the act must be restricted to matters before the treasury, and not to matters coming within the jurisdiction of other courts.

Decree for complainants.

The case has been appealed.

UNITED STATES CIRCUIT COURT—LOUISIANA.

A party who expects to bid at an assignee's sale may, when the terms are cash, on the day of the sale, agree with another that in case he becomes the purchaser he will sell the property to the latter at a named price on terms of credit.

The solicitor of the assignee cannot bid at an assignee's sale.

Citizens' Bank v. Ober.

An agreement between a party who intends to bid at an assignee's sale, and the assignee's solicitor, that the former will let the latter have the property at a fixed price without any reference to the amount at which it may be bought, does not vitiate the sale.

CITIZENS' BANK v. *OBER.*

THIS was a petition addressed to the supervisory jurisdiction of the Circuit Court, under the 2d Section of the Bankrupt Act. Certain property of York & Hoover, the bankrupts, having been sold, and the sale confirmed by the District Court, sitting in bankruptcy, this petition was filed to reverse the decree confirming the sale.

Messrs. Wm. M. Randolph and *H. M. Hyams*, for petitioner.

Mr. John A. Campbell, for Ober.

WOODS, J.—It appears from the record that on the 16th day of February, 1869, two plantations, called respectively, "White Hall" and "Home," the property of the bankrupts, were sold at public sale by the assignee to Albert G. Ober, of the firm of Ober, Atwater & Co., said firm being among the mortgage creditors of the bankrupts.

The motion to confirm the sale in the Bankrupt Court was resisted on the ground that the purchaser had used illegal and improper influences to deter other persons from bidding, and that the purchase was made by Ober for and in behalf of Norton, the assignee, and that Norton was in fact the purchaser.

The District Court referred the question of the fairness and validity of the sale to a commissioner, who reported in favor of the fairness and *bona fides* of the sale.

The District Court, after argument, confirmed the report of the commissioner, and it is to reverse this order that the present petition was filed.

The testimony taken by the commissioner establishes conclusively that the assignee was not a party directly or indirectly to the purchase, nor interested therein in any manner or degree; that so far as he was concerned, the sale was

conducted fairly and according to law; and the objection that he was interested in the purchase appears to have been abandoned.

Relative to the averment that Ober, Atwater & Co. had used illegal and improper influences to deter other persons from bidding, the following facts are established: John S. Scott, about an hour previous to the sale, proposed to Ober, Atwater & Co., that in case they became the purchasers of the "Home" place, he and his friends, whom he represented, would buy the place of them for the price of thirty-five thousand dollars, of which twenty thousand dollars was to be paid in cash, and the residue, fifteen thousand dollars, in October following the sale. Ober, Atwater & Co. gave Scott the impression that they would sell to him at the price and upon the terms named; but Scott did not inform them that he intended to bid at the sale, nor that he was prepared to pay cash for the property. Scott, who made this arrangement, was ready to bid thirty-five thousand dollars, and had the means of his friends at his command to make his bid good. He testifies that he refrained from bidding on account of the arrangement which he supposed he had made to purchase from Ober, Atwater & Co.

It is further shown that H. D. Stone, Esq., was the solicitor of the assignee of York & Hoover in the matter of their bankruptcy. That, about an hour before the sale, Ober, Atwater & Co., at the suggestion of Stone, made to him the following proposition in writing, the handwriting of the body of the paper being Stone's:

New Orleans, La., Feb. 16.

H. D. Stone:—We will sell you White Hall plantation for twenty thousand dollars at any time after we purchase it. But you shall not be obliged to take it till our mortgage thereon is judicially determined to be valid as a first mortgage; or you may have one-half of White Hall and Home place for twenty-two thousand five hundred dollars at any time, but you shall not be obliged to take it until it is judicially deter-

mined that we have a first mortgage upon both places. For value received, we agree to carry out the above proposition in good faith. OBER, ATWATER & Co.

Ober, of the firm of Ober, Atwater & Co., became the purchaser at the sale of both places; of the Home, at the price of nineteen thousand eight hundred dollars, and of White Hall, at twenty-two thousand dollars.

These are substantially the facts as shown by the evidence.

In regard to the arrangement with Scott, standing alone, I cannot go to the length to say that it is sufficient to avoid the sale. In my opinion it is permitted to a party who expects to bid at a sale, when the terms are cash on the day of sale for the whole amount of the purchase price, to agree with another party, that in case he becomes the purchaser, he will sell the property to him at a named price on terms of credit. This is clearly so when the person proposing to purchase has no knowledge or notice that the party proposing to buy is prepared to pay cash, and is ready to bid, and able to make his bid good. The proposition for a credit for a part of the purchase-money, is a strong indication that the party making the proposition is not able to buy at the sale and pay cash, and may well be taken by the person to whom the proposition is made as an admission to that effect. (*Phippen* v. *Stickney*, 44 Mass., 384; *Small* v. *Jones*, 1 Watts & Serg., 128.)

In regard to the proposition made to Stone, it is admitted by counsel for Ober, Atwater & Co., that the assignee could not purchase at his own sale, nor, under the Bankrupt Law and practice in England, could his solicitor, because, there, the solicitor of the assignee is chosen by the creditors. But, under our law and practice, it is claimed the rule is different, because here the assignee is allowed to choose his own solicitor, without regard to the wishes of the creditors. I do not see how the method by which the solicitor is selected, can change the rule. The assignee represents all the creditors. It is his duty so to administer the estate as to produce the

best dividends, and so to distribute it as that each creditor shall receive his just rights. To enable him to discharge these duties, the law allows him the assistance of counsel, and authorizes payment to his counsel out of the assets of the estate. The solicitor is not the personal counsel of the assignee, but of the assignee as the representative of the creditors. His fees are paid, not by the assignee, but in effect by the creditors. His first duty is to the estate. It is therefore his duty, when he is retained generally in the bankruptcy, to assist the assignee in the interest of all the creditors—to aid him in the collection and just and equitable distribution of the assets, and, if possible, to allow no creditor to obtain an unfair advantage over others. (*In re* Mallory, 4 N. B. R., 153.)

With these obligations resting upon him, it is difficult to see why the solicitor should be allowed to purchase at an assignee's sale when the assignee is not. When he becomes a purchaser, his interest is to buy at as low a price as he can; his duty as solicitor to the assignee is so to advise his client, that the property sold may bring the highest price; so that if he is both purchaser and solicitor, his interest is in conflict with his duty.

Judicial and bankrupt sales ought to be protected by the application of such general rules as to insure the utmost fairness and good faith, and to remove far from those whose duty it is to conduct them, or who are in any way officially connected with them, any temptation to fraudulent or unfair practices.

If the sale was made to Stone, either directly or indirectly, or if the arrangement made with him was for the purpose of suppressing bidding at the sale, and had that effect; in either case, I should not hesitate to set the sale aside as void.

It was not a direct sale to Stone. Was it an indirect one? It is not pretended that Ober, Atwater & Co. bid for Stone; they bid for themselves, expected to pay, and did pay their own money on their bid. They did not agree to let Stone have

the property at what they bid for it. The arrangement was that he was to take it at a price fixed between them in advance, and without any reference to the amount at which they bought. It was nothing more than an agreement to sell to him at a fixed price, should they become the purchasers. It was not, therefore, an arrangement for an indirect purchase by Stone at the assignee's sale, but a contract to buy from a purchaser on an entirely different consideration.

Did it have a tendency to suppress bidding at the sale? Stone swears that he had no intention of bidding, and in this he is uncontradicted. There is no evidence to show that Ober, Atwater & Co. had any suspicion that Stone's purpose was to bid. It did not have the effect to restrain bidding on the part of Ober, Atwater & Co., for it was their interest, with or without the bargain with Stone, to get the property at as low a price as possible.

Norton, the assignee, was in utter ignorance of the contract. So was the auctioneer. Stone did not advise about or interfere with the sale. It was conducted fairly, according to law. The understanding with Stone did not have the effect to suppress competition; was, in all probability, not made for that purpose. Stone did not buy, directly or indirectly, at the assignee's sale. Ought the sale to be declared void by reason of his understanding with Ober, Atwater & Co.? I think not. The case is in precisely the same plight as if Stone had made an illegal contract with Ober, Atwater & Co. about some matter entirely disconnected with the sale. After a careful consideration of this case, I am unable to say that the understanding of Ober, Atwater & Co., with either Scott or Stone, was such as to render the sale fraudulent or against public policy.

The District Court was therefore right in confirming the sale.

The petition to reverse its decree must therefore be dismissed at the cost of petitioner.

SUPREME COURT—IOWA.

If the assignee takes no steps to redeem mortgaged property, the mortgagee may institute a proceeding in a State court to foreclose the mortgage.
If the bankrupt appears in a proceeding in a State court to foreclose a mortgage, and moves for a stay of the proceedings, that portion thereof looking to a personal judgment against him should be stayed.
A judgment entered after a motion for a stay of the proceedings is erroneous, although it provides that no execution shall issue until the further order of the court.

McKAY v. *FUNK.*

BECK, CH. J.—*First.* The appellant claims that the District Court had not jurisdiction in the case to proceed to judgment either in the foreclosure of the mortgage or on the personal claim against the defendant, but should have stayed proceedings in each upon defendant's motion. The proceedings are of a double character and object: 1. To foreclose the mortgage and subject the lands to the lien thereof. 2. To recover judgment against defendant personally, which may be enforced for the amount of the debt remaining unsatisfied after the sale of the lands upon the decree of foreclosure.

It has been determined by this court that the bankruptcy of the mortgagor does not defeat the jurisdiction of the State court to entertain a cause of foreclosure, when the assignee has taken no steps to redeem from the mortgage, and the mortgagee has not filed a claim for the debt secured, in the bankruptcy proceeding; acts which are necessary to give the Bankrupt Court jurisdiction over the mortgaged property. (*Brown* v. *Gibbons*, 37 Iowa, 661.)

Following this decision, we hold that the District Court possessed jurisdiction to entertain the foreclosure proceeding, and by proper decree order the sale of the property, and the application of the proceeds to the payment of the mortgage debt. The decree to that extent is affirmed.

Second. The other proceedings in this action looking to a personal judgment against defendant, inasmuch as they involved a matter—a personal debt against one adjudged a bankrupt—which was within the jurisdiction of the Bankrupt

Court, ought, under Section 21 of the Bankrupt Act, to have been stayed, and nothing further done therein after defendant's motion, until the final determination of the question of the bankrupt's discharge.

Doubtless, it was esteemed by the court below that the order staying execution, fully complied with the requirements of the section of the Bankrupt Act just cited; but it does not so appear to us. After the motion was filed, nothing ought to have been done further than the entering of an order staying proceedings. But a judgment was rendered, which, however, was not to be enforced by execution until the further order of this court. The law was not followed, and the judgment against defendant personally was, therefore, erroneous, and must be reversed.

As it does not appear that specific objection on these grounds was made to this judgment in the court below, and as the decree of foreclosure is affirmed, the reversal will be without costs. The defendant will pay all the costs of this appeal. The cause will be remanded for proper proceedings in harmony with this opinion.

Affirmed as to the decree of foreclosure. Reversed as to the personal judgment against defendant.

SUPREME COURT—VERMONT.

If the bankrupt is a party to a submission of a controversy to a Register, he is bound by the decision in a collateral action.

The claim of a conditional vendor for a conversion of the property by the bankrupt is not barred by a discharge.

A conditional vendor by proving his debt, does not lose his claim for the conversion of the property.

WILLIAM JOHNSON v. *GEORGE C. WORDEN.*

WHEELER, J.—As this case is here understood, the defendant was himself a party to the submission to Judge Underwood. Having made that submission, he is bound by the decision, not because he had any authority to submit claims

of the assignee, nor because Judge Underwood had any authority as Register over the question, but because he could submit his own claim to arbitration, and Judge Underwood had authority as an arbitrator. The right of the defendant to have the avails of the Morse claim go in satisfaction of plaintiff's demand, was decided against the defendant, and the plaintiff thereby lost all benefit of the avails, and his claim was left unsatisfied, the same as if he never had received them. When the defendant sold the oxen, he did it in fraud of the plaintiff's right to them. The plaintiff had entrusted him with them, and this disposition of them in that way, was a breach of the trust the plaintiff had placed in him. The plaintiff's claim in controversy in this case, is founded upon that breach of trust, and this claim, even if it had been proved in the bankruptcy proceedings, would have been saved from being barred, by the provisions of the 33d Section of the Bankrupt Act. By the contract of conditional sale between the plaintiff and the defendant, the plaintiff had his debt against the defendant for the oxen, and also a right to the oxen till his debt should be fully paid. When the defendant converted the oxen by selling them, the plaintiff had his right of action for the conversion, in lieu of the oxen, and could hold that, as well as his debt, till the debt should be paid. When he proved the debt for the oxen, he was pursuing that one of his remedies, and could do so without losing the other, until his right to his pay for the oxen should be fully satisfied. Not having been paid in that way, he had a right to pursue the other remedy, as he has done in this case. There was no exception taken upon the subject of damages, and it is not necessary to consider whether the amount of the dividend on the plaintiff's claim, tendered by the assignee, should have operated as a satisfaction of so much of the plaintiff's debt, nor is it necessary to consider whether plaintiff's measure of damages should have been limited to the amount due on his debt.

Judgment affirmed.

UNITED STATES DISTRICT COURT—MAINE.

The circumstances attending a transfer may be such that the creditor will not be justified in relying on the debtor's false statements as to his condition.

If a mortgage is made in part to prefer the mortgagee as to his claim, and in part to secure a present loan made for the purpose of enabling the debtor to prefer another creditor, it is entirely void.

JOSIAH A. BUCKNAM, Assignee of DANIEL M. GOSS, v. *ABIAL GOSS.*

Putnam, for complainant.
H. Dunn, for respondents.

Fox, J.—An involuntary petition was filed against Daniel M. Goss, May 14, 1874, and he was adjudged bankrupt June 1, 1874; the complainant was appointed assignee, and has brought this bill against Abial Goss, an uncle of the bankrupt, praying that a mortgage on certain real estate at Mechanics' Falls, given to said Abial by the bankrupt, on the 6th day of April, 1874, to secure the sum of two thousand five hundred dollars, may be declared fraudulent and void, and that he may be required to release and surrender said mortgage, and be enjoined from making any claim under the same.

It appears that the bankrupt went into business as a trader, at Mechanics' Falls, in 1871, making most of his purchases in Portland. He was also collector of taxes for the town of Minot, and appropriated to his own use some portions of the sums collected by him in that capacity. At the time of the filing of the petition against him, he was indebted over eight thousand dollars, and was not possessed of any visible property, having, a short time before, disposed of the balance of his stock in trade for twelve hundred dollars, which he applied towards his liability as collector of taxes. His real estate was encumbered by two mortgages, prior to that given to the respondent, in all, probably, for more than

the full value of the property, so that nothing of any amount remained, subject to the claims of his general creditors.

Abial Goss was formerly a merchant in Boston, but retired from business and resides at Cambridge, Massachusetts. On the 1st day of April, 1871, he loaned the bankrupt fifteen hundred dollars, secured by a mortgage upon certain real estate in Oxford county. Upon this debt, but six months' interest had been paid prior to April 6, 1874. The buildings upon the Oxford estate were destroyed by fire, and the insurance was received by the bankrupt, and also a small amount of money from the sale of a portion of that estate. The residue of the Oxford property, it was agreed by the parties on the 6th of April, 1874, that Abial Goss should take at four hundred dollars, in part payment of his claim, and after crediting that sum, there was due from the bankrupt thirteen hundred and ninety-five dollars or thereabouts. Abial had repeatedly, before April 6th, 1874, written to the bankrupt, urgently demanding his interest. The bankrupt always promised to pay the same, sometimes fixing a definite time at which it should be paid, but he always failed to comply with his promises. On the 2d of April, 1874, the bankrupt telegraphed to Abial "that he wanted him to come down on important business," and on the 3d, he wrote him a letter of similar import, urging him to come at once. He accordingly came to Mechanics' Falls, the bankrupt being very lame and unable to travel, and he then represented to Abial that he had spent a portion of the amount he had collected for taxes, and his bondsmen were called on for the amount, and he wished to obtain from his uncle a further loan to discharge this claim. It was finally agreed, that a new mortgage on the property at Mechanics' Falls should be executed for two thousand five hundred dollars, thirteen hundred and ninety-five dollars of which amount was the sum and interest thereon, already loaned to Daniel, and the balance, eleven hundred and five dollars, was to be subsequently advanced to Daniel by Abial. The respondent, as well as the bankrupt and his wife, all testify that this sum was afterwards paid

over to Daniel by Abial, in two different amounts, five hundred dollars at one time, and the balance subsequently; certain letters from Daniel to Abial are produced in evidence, which tend to show that no portion of this eleven hundred and five dollars was paid prior to April 15, as there is produced a very urgent letter from Daniel to Abial of that date, asking for the sum of five hundred dollars, he having on the 10th of April written him a letter in which he says, "If you will send me five hundred dollars, as we talked, I will pay you when I agreed to, and I can raise the balance to pay the town." Abial now exhibits two receipts, signed by Daniel, one bearing date April 6th, for five hundred dollars, the other for six hundred and five dollars, dated April 18th. The court is well satisfied that nothing was paid on April 6th, as Daniel and his wife both testify that Abial brought no money at that time, and that the first payment was eight or ten days after that time, the receipt is therefore false as to its date, and as the letters of Daniel on the 10th and 15th are pressing in their calls for a like sum, five hundred dollars, "as they had talked," and not six hundred and five dollars, the balance that would remain to be paid by Abial, if five hundred dollars had been previously advanced, it must have been after April 15th instead of April 6th that this sum of five hundred dollars was paid,—if it ever was advanced by Abial. He testifies in his first deposition, that on April 6th, 1874, he let Daniel have the five hundred dollars, and "I then took from him the receipt of which I append a copy." This statement is proved to be untrue, and no reliance can be placed upon it.

Daniel has been inquired of as to what disposition was made by him of the eleven hundred dollars, but gives no satisfactory explanation in relation to it. He admits that none of it was paid on account of taxes, as he falsely pretended to his uncle he intended to apply it, and upon the whole evidence, notwithstanding the positive statements of three witnesses that it was paid, I have serious doubts whether more than five hundred dollars was paid to Daniel by Abial

after April 6th, and I am quite sure, if it was paid, it was never applied by Daniel to the discharge of his honest liabilities.

In the view which the court takes of the present case, it is not necessary for me to determine this point, because, conceding the payment of the eleven hundred and five dollars to have been made by Abial to Daniel, I am of opinion that this mortgage cannot be sustained. It is also unnecessary for the court to determine whether the rights of the parties are to be governed by the original provisions found in the Bankrupt Act, which hold a party chargeable with obtaining a fraudulent preference, "if he had reasonable cause to believe that the debtor was insolvent, and that the conveyance was in fraud of the act," or whether they are controlled by the Amendatory Act of June, 1874, by which the party is required to have had knowledge of the debtor's insolvency, in order to defeat his security, as I am of the opinion that the evidence in the present case establishes all that is requisite to bring this mortgage within the requirements of the Amendatory Act.

The 35th Section of the original act provided "that if the conveyance was not made in the ordinary course of business of the debtors, this fact shall be evidence of fraud," and it was ruled by Mr. Justice Clifford, in *Scammon* v. *Cole*, 5 N. B. R., 257, 265, that this provision is alike applicable to preferences under the first clause of the section, as it is to sales under the latter clause. Section 5130 of the Revised Statutes in terms declares, that whether the conveyance is by way of preference or sale, if it is not made in the usual and ordinary course of business of the debtor, the same shall be *prima facie* evidence of fraud.

The insolvency of the bankrupt on the 6th of April is expressly charged in the bill, is not denied in the answer, and is fully shown by the testimony, but the respondent avers that he had no knowledge of it at that time. What then are the facts admitted by him to have been within his knowledge on that date, which bear upon this question of the insolv-

ency of Daniel? It is proved that Daniel borrowed of Abial fifteen hundred dollars, April 1, 1871, at seven and three-tenths per cent. interest, upon which only six months' interest had been paid, and that at the giving of the note; that the buildings on those premises had been destroyed by fire, and Daniel had received the insurance money, and also the amount paid, by a purchaser of a portion of the mortgaged premises; that Abial had urgently and repeatedly called upon Daniel to pay his interest, and although strong professions of his intent so to do were constantly manifested by him, yet that nothing ever resulted therefrom, and nothing further was ever paid. That in April, 1874, by letter and telegram, Abial was pressed by urgent appeals from Daniel to meet him at Minot, on matters of importance, and when there, it was disclosed to him by Daniel that he was in default as tax collector, and that his bondsmen were pressing for relief from their liability,—and it was quite apparent, that for this ostensible purpose, a loan was required, and although it is true that the bankrupt deceived Abial, and did not apply the amount which he may have received to the alleged payment of his liability as collector, but discharged that by a sale of his stock, and paying to his bondsmen the amount he received from this sale, still it is quite evident that these facts, his long-standing debt to Abial, and his delinquency as collector, were within the knowledge of Abial before the execution of the mortgage, and were sufficient to charge any person of ordinary intelligence with knowledge of the debtor's insolvency. In my opinion, no part of the eleven hundred and five dollars was paid prior to April 15, by Abial to Daniel. In a letter from Daniel to Abial of that date, he states "that his Portland creditors have given him an extension for four months," thus most directly and explicitly notifying Abial of his inability to meet his business payments as they fell due, which is insolvency within the meaning of the Bankrupt Act, and this notice was before any advances were made by Abial on the credit of this mortgage. Besides, a mortgage to secure demands of this nature, upon all the real

estate of the bankrupt, and for more than its full value, as in his schedules he returns it as of the value of four thousand dollars, was certainly not in the ordinary course of the debtor's business, as is held, in *Pearson* v. *Goodwin*, 91 Mass., 482, and 11 Wall., 387, and is by the Bankrupt Act, therefore, *prima facie* evidence of fraud. The respondent claims that the bankrupt orally and by letter, represented that he was doing a good business, and that his Portland creditors were ready to trust him for further purchases, and that he did not intend to fail but expected to continue in business, and it further appears that he also represented to the respondent "that the extent of his liabilities, including what he owed as collector, were from seven hundred to eight hundred dollars only." This latter statement is shown to have been a willful falsehood, as at that time he was indebted to his Portland creditors alone, more than two thousand two hundred dollars, and the court has not credulity enough to believe that the bankrupt was not, at that time, well aware of that fact. From the facts and circumstances, the court cannot but draw the conclusion, that on the 6th day of April, 1874, the bankrupt was mindful of his pecuniary condition, and that he intended to discharge his liabilities as collector of taxes, securing the respondent for what he might be owing him, and leaving nothing whatever for the payment of his other creditors. With the knowledge of these facts in relation to Daniel's liabilities, and of his misconduct as tax collector, which Abial then had, being thus advised of his insolvency, and that a mortgage taken under such circumstances would be *prima facie* fraudulent and void, the court cannot sanction his reliance on the false statement of the bankrupt as to his condition, good credit, and standing, especially as his dealing with the funds of the town had shown his dishonesty. He should, before taking this security, have made further inquiries, and ascertained for himself, from others, the amount of Daniel's indebtment, his assets and liabilities, and the slightest inquiry would have demonstrated his utter insolvency.

I am therefore compelled to the conclusion that this mortgage was a fraudulent preference, within the meaning of the Bankrupt Law, certainly to the extent of the prior indebtedness, and it must, therefore, to that extent at least, be held invalid as against the assignee. This amount was included in and formed a portion of the note then received by Abial of Daniel, the whole constituting but one contract or obligation, and secured by one mortgage. But a portion of the consideration of this note was, it is claimed, a new and present indebtment, being a new loan for eleven hundred and five dollars, and the question arises whether there can be such an apportionment of the note and mortgage, as to sanction it in part as security for this amount.

This precise question was presented to the Supreme Court of Massachusetts, in *Denny* v. *Dana*, 56 Mass., 161, and it was there held that a mortgage of personal property, which as to some portion of the debt thereby secured is in contravention of the insolvent laws, is wholly void. The same principle is reaffirmed in 99 Mass., 539.

If these decisions are to be received as correct, and if any part of the purpose of the sale or conveyance was fraudulent under the Bankrupt Law, that the whole was void, is the rule of law, of course the entire mortgage fails in the present case, and the respondent cannot derive any benefit therefrom, notwithstanding a portion of the debt secured thereby, was a present loan at the execution of the mortgage.

I must confess that this rule does not, in all cases in bankruptcy which may occur, commend itself entirely to my judgment. If the entire new loan, made at the execution of the mortgage, has, either directly or indirectly by the property acquired thereby, come to the possession of the assignee, and the estate in bankruptcy is increased thereby, to the full extent of the loan, so that no detriment has been sustained in that behalf, it would seem to be only equitable that if the estate in bankruptcy has thus received such an advantage from the loan, it should also bear the burden, and the assignee should not be at liberty to avoid the security therefor.

But such is not the present case. No portion of this eleven hundred and five dollars has come to the assignee, either directly or indirectly. This amount, if advanced at all, was advanced for the purpose of paying and discharging the bankrupt's liabilities as collector. A preference was thereby designed and intended to be given to the bondsmen of the bankrupt, and to secure and indemnify them from their liability as his sureties on his official bond. Abial Goss well knew that such was the avowed purpose of Daniel, and he intended to aid him to the extent of this loan, in accomplishing this purpose, which was clearly fraudulent under the Bankrupt Law.

Whether the sureties on the bond could or could not be made to refund the payment, if they had been thereby discharged from their liability, is not the question now to be determined, but it is, whether the mortgagee, by making this loan for the avowed purpose of discharging prior outstanding liabilities of the debtor to third parties, was not so far guilty of aiding in a fraud upon the Bankrupt Law, that his security therefor, although taken at the time, is void.

Judge Lowell, in *In re* Butler (4 N. B. R., 303; 1 Lowell, 506), has examined this identical question, and I concur with him in his opinion that such a conveyance is invalid. If invalid, when such is the entire purpose and consideration of a mortgage, of course such a claim, when included in and part of a note and mortgage, otherwise fraudulent and void, can find no aid or support from such fraudulent conveyance. The whole is in all respects affected with and burdened by a purpose and intent of all parties, in fraud of the Bankrupt Law, and it becomes the duty of the court to adjudge the entire mortgage as wholly inoperative and invalid against the assignee in bankruptcy.

SUPREME COURT—NORTH CAROLINA.

The Bankrupt Law does not divest a lien, but, as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unencumbered, passes to the assignee, and is in *custodia legis*, subject to priorities and liens, it follows that the Bankrupt Court is the proper tribunal in which to administer the remedies for the enforcement of liens.

All claimants against the estate of a bankrupt, are required to prove their debts, however evidenced.

E. T. BLUM, Executor, v. *ISAAC W. ELLIS.*

MOTION for leave to issue execution, heard before Cloud, J., at Spring Term, 1875, Forsythe Superior Court.

At May Term, 1870, of Forsythe Superior Court the plaintiff's testatrix, Miss M. N. Transon, obtained a judgment for seven hundred and sixty-one dollars and sixty-five cents, and costs, against the defendants, Isaac W. Ellis and Holden Smith, on their promissory note, executed to the testatrix of the plaintiff, as sureties for one S. E. Smith.

A transcript of this judgment was sent to the clerk of the Superior Court of Davie county, on the 12th day of August, 1871, and made a judgment roll of that court, the defendants residing and holding real estate in that county. Both of the defendants at that time had their homesteads laid off, which covered their real estate.

The testatrix of the defendant died on the 7th day of May, 1872. On the 30th day of May of that year, the plaintiff qualified as her executor, and on the 23d day of April, he was made a party plaintiff to said judgment on the docket in Forsythe county, but not on the judgment roll of the court docket in the county of Davie. Since August, 1870, no execution has issued on said judgment.

At May Term, 1874, of Forsythe Superior Court, the plaintiff moved for leave to issue an execution against the defendant, Isaac W. Ellis, upon notice duly served upon him, returnable to that term, the defendant, Holden Smith having prior thereto obtained his certificate of discharge

from his debts in the Bankrupt Court. It also appeared that Isaac W. Ellis, on the 30th of June, 1873, obtained his discharge from the Bankrupt Court, and that the reversionary interest in the real estate owned by him in the county of Davie at the date of the judgment aforesaid, was re-conveyed to him by his assignee in bankruptcy, under the order of said court, no creditors having proved their claims in the Bankrupt Court.

It further appeared that the plaintiff's judgment against the said Ellis, was duly scheduled in the name of M. N. Transon, the testatrix, in his bankrupt petition, which was filed in the Bankrupt Court, March 24th, 1873, and that notice was mailed by the assignee to M. N. Transon, the testatrix, to Salem, her place of residence, which the executor never received. No notice was ever mailed to said executor, nor served on him in any way whatever.

The usual publication in the newspaper was made, and the executor filed an affidavit, in which he stated that he did not have any knowledge of the proceedings in bankruptcy, until the defendant, Ellis, had obtained his certificate of discharge, and said real estate had been re-conveyed to him by his assignee, and it was proved that said judgment had not been paid.

Upon this statement of facts, the plaintiff insisted that the judgment roll of the Superior Court of the county of Davie, created from its date, to wit: August, 1870, a lien on all the real estate of Ellis, in said county, which was not divested by the proceedings in bankruptcy, and that the plaintiff had the right to enforce this lien in the State court, and moved the court for leave to issue execution to keep alive said judgment.

The court refused the motion, and the plaintiff appealed.

SETTLE, J.—Congress has power, under the Constitution of the United States, to establish uniform laws on the subject of bankruptcies throughout the United States.

In order to make the laws uniform, the bankrupt tribunals

must act independently of State tribunals, and must control them in all things pertaining to the bankrupt and his estate, for it would entirely destroy the system, by preventing that uniformity which is enjoined by the Constitution, if suitors should be permitted, at their pleasure, to withdraw from the bankrupt courts into the State tribunals, cases involving any of the questions which grow out of the administration of the assets of a bankrupt.

It is not denied that Congress could have withdrawn from the State courts all cases pending against a bankrupt at the time of the adjudication of his bankruptcy, but for convenience, as it was supposed, this was not done, and the assignee of a bankrupt is permitted to prosecute or defend an action in the State courts, either to recover the estate of the bankrupt or to ascertain the liabilities and liens upon it.

The Bankrupt Act does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unencumbered, passes to the assignee, and is in *custodia legis*, subject of course to priorities and liens, it follows that the Bankrupt Court is the proper tribunal in which to administer the remedies for the enforcement of liens. The State courts, as we have said, may be employed to collect the assets of a bankrupt, and also to ascertain the liens which may exist upon such assets, but it is one thing to ascertain a lien, and quite another to liquidate it; and if a party can liquidate his own liens, through the intervention of a State court, in the absence of the assignee, who represents the general creditors, there is no protection to other creditors against collusion and fraud between the bankrupt and such claimant; further, the settlement of the estate of a bankrupt may be indefinitely postponed by tedious litigation in the State courts.

While all subsisting liens are fully protected by the Bankrupt Act, we think, by the true interpretation of that act, all claimants against the estate of the bankrupt are required to prove their debts, however evidenced. If not so, why, in addition to the requirement that the bankrupt shall

enter upon his schedule all secured debts, etc., does the 22d Section of the act require the claimant to prove his demand, and "disclose whether any and what securities are held therefor?" The 1st Section confers jurisdiction upon the Bankrupt Court to ascertain and liquidate the liens and other specific claims upon the assets of the bankrupt. Here are several courses open in the Bankrupt Court to the secured creditor, but he must adopt some one of them; he will not be permitted to sleep upon his lien until everything is closed in the Bankrupt Court, and then virtually nullify the whole thing by proceedings in the State courts. If he remains outside of the Bankrupt Court, he does so at the risk of having his debt barred, and he may also lose the benefit of his securities. We are aware that cases may be found in great abundance, both supporting and opposing the positions here assumed. We do not feel called upon to cite or comment upon them, but feel ourselves at liberty, in this conflict of authority, to adopt what appears to us to be the most reasonable interpretation of the Bankrupt Act, and one which will lead to the least confusion in the administration of the assets of a bankrupt. Indeed, when we behold the confusion in which this subject has been involved by the conflicting decisions of different courts, we are inclined to think that it would have been better had Congress withheld entirely from State tribunals all questions touching the bankrupt, his creditors, and his assets.

We give no weight to the suggestion that the plaintiff in this case had no notice of the proceedings in bankruptcy, for this debt was entered upon the defendant's schedule, and notice was sent by mail addressed to the plaintiff's testatrix, and the usual publication of notice was made in the newspapers.

This court has held in *Knabe & Co.* v. *Hayes*, 71 N. C., 109, that the discharge of a bankrupt does bar the claim of a creditor who had no knowledge of the filing of the petition in bankruptcy, and whose name was not inserted in the schedule of creditors, and to whom no notice was mailed,

unless the creditor alleges and can show that the omission to give notice was the result of fraud on the part of the debtor, and not the result of forgetfulness, accident, or mistake.

Per curiam. The judgment of the Superior Court is affirmed.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

It is the right of a creditor to have a full disclosure, on oath, by the bankrupt of everything relating to his estate, and with such detail as will be necessary, or may be useful to the assignee in the discharge of his duties; and it is the duty of the bankrupt to submit to such examination promptly, on reasonable application.

A bankrupt who has fully submitted to examination, has a right to be protected against unreasonable demands upon his time for further examination; and where ample opportunity has been afforded, and an examination already had is apparently full, unless it is made to appear that such examination was collusive, or in some material and specified particulars deficient, an application for further examination may properly be refused.

In re JAMES W. FRISBIE.

PENDING proceedings before the Register for the bankrupt's discharge, an *ex parte* order had been made by the Register for the examination of the bankrupt, on the application of creditors who had appeared to oppose his discharge. The bankrupt appeared, but objected to the examination, and his objections were certified into court for determination. The court referred the question back to the Register for his opinion thereon. From the statement of the Register it appears:

First. That the proceedings for the adjudication of said bankrupt were commenced on the 7th day of January, 1874, by his creditors; that the first meeting of creditors was held and an assignee elected on the 17th day of February, 1874; the whole number of creditors who, in the course of the proceedings, proved claims against said bankrupt's estate

was sixty-six, amounting, as computed to the date of the bankruptcy, to the sum of one hundred and thirty-eight thousand and seventy dollars and twenty-one cents. Of these, fifty-seven in number, whose claims amounted, as computed, to the sum of one hundred and one thousand three hundred and seventy-four dollars and eighty-seven cents, were proved at or before the first meeting of creditors; an unusually large number of claims in this case (including those of E. S. Jaffray & Co. and D. Valentine & Co., amounting together to the sum of seventeen thousand eight hundred and twenty-six dollars and thirty cents), was proved so as to enable the creditors to participate in the election of the assignee. Only eight creditors whose claims amounted to four thousand five hundred and thirty-five dollars and twenty-four cents (excluding from the enumeration the claim of Mrs. Frisbie), proved their claims after the first meeting. On the 13th of July, 1874, the second meeting of creditors was held, and after due notice that the assignee had filed his final account, and would at that meeting apply for its allowance and his discharge, the final order of distribution was entered.

Second. On the day of the second meeting, Oberholser & Keefer filed objections to the discharge of the assignee; on the 16th of July, they filed a petition for the examination of the bankrupt, and on the 18th of July, a petition to expunge the claim of Mrs. Frisbie, the bankrupt's wife. No application for the examination of the bankrupt was ever filed by the assignee, nor any application for such examination by any other creditor, until that filed by E. S. Jaffray & Co. and David Valentine & Co. on the 15th day of June, 1875. The examination of the bankrupt on the application of Oberholser & Keefer, was commenced on the 23d of September, 1874, continued on the 25th and 29th, and was read to the bankrupt, and subscribed by him on the 19th of October, 1874. Mrs. Frisbie was examined on the 29th of September, and the bookkeeper of the bankrupt, Frank B. Webster, was examined on the 22d, 28th, and 30th of September. The examinations of the bankrupt and his bookkeeper, the books

of the bankrupt being present, were conducted mainly by an expert accountant employed by the creditors for that purpose. On the 3d of October, an order was entered, fixing the 9th day of October for the hearing of the petition of Oberholser & Keefer, for the re-examination of the claim of Mary B. Frisbie. This hearing was continued from time to time until the 23d day of October, and from that day remained pending and undetermined until the 11th of March, 1875, when the proceedings for the re-examination of the claim of Mary B. Frisbie were formally discontinued by the parties who commenced them.

Third. On the 24th of April, 1875, the bankrupt filed his petition for a discharge. An order was entered on the 29th of April, fixing the 25th day of May to show cause against said petition; notice of which was first published on the 30th day of April, in two papers in the city of Detroit; and notice was given to the creditors, including E. S. Jaffray & Co. and D. Valentine & Co., by mail, the notices being deposited in the post-office in Detroit on or before the 13th day of May. On the 25th day of May, the appearances of Jaffray & Co. and Valentine & Co. were entered to oppose the bankrupt's discharge; and on the 15th of June, an application was filed for an order for the examination of the bankrupt and witnesses. An order for their examination was entered, the proceedings under which were arrested by the objections of the bankrupt to any further examination, on which the questions arose which were certified to the court, and are now submitted to the Register for his opinion.

The points made by Mr. D. M. Dickinson on behalf of the bankrupt, in support of his objections to any further examination are the following: He objects—

First. Because the application for such examination does not show any ground for such examination at this time.

Second. Because nearly two and one-half years have elapsed since the commencement of these proceedings to the time of this application, and the bankrupt has submitted to all orders of the court, and has appeared, from time to time,

for examination as required, and has submitted to a full, thorough, and exhaustive examination under said section, which was not abated or interfered with, prevented or stopped by any solicitation, payment, or other influence of this bankrupt, or in his behalf.

Third. Because the creditors applying for such examination have, by *laches*, forfeited all legal rights to any further or other examination, and the application now is made only after an application for a discharge has been made, and is oppressive and harassing to the bankrupt and his family.

Fourth. Because the estate is closed, and its assignee has received his final discharge from office, so that the result of such examination cannot benefit this estate.

OPINION OF THE REGISTER.

The first three points submitted on behalf of the bankrupt turn mainly upon the question, whether the creditors, by *laches*, have lost the right to require the bankrupt to submit to a further examination. The fourth point,—that "the estate has been closed"—as a general rule does not appear to me to be conclusive, though perhaps it may be so in the case presented by these papers; because, if a creditor has a reasonable ground to believe that a further examination would disclose other property, the application for such examination ought to be entertained at any stage of the proceedings, upon a proper cause being shown for it. No such case, however, is made here, nor does this examination appear to be applied for with any such object.

In determining the question of *laches*, which the first three points made on behalf of the bankrupt present, it is important to consider the mutual rights and duties of creditors and bankrupts in bankruptcy cases. It is the right of the creditor to have a full disclosure, on oath, by the bankrupt, of everything relating to his estate, and with such detail as will furnish to the assignee all the information in his power to render, and which may be necessary or useful

to the assignee in the discharge of his duties; and it is the duty of the bankrupt, promptly, on all reasonable applications, to submit to such examination. It is the right of the bankrupt, when he has submitted himself to such examination, that he should not be unnecessarily hindered in his business, or his efforts to support himself, or those dependent on him; and it is the duty of the creditor, when bankruptcy proceedings are commenced, to go forward with reasonable promptness with the prosecution of the case.

If these mutual rights and duties are here correctly stated, it will be seen that the right of a creditor to a disclosure from the bankrupt, is not an unlimited right to require the bankrupt to submit to an examination. If a full examination has been already had, either upon the application of the assignee, or of any other creditor, a subsequent application may be properly denied, unless it is made to appear that the first examination was either collusive, or deficient in some material and specified particulars. And the court, whenever such an application shall be made will exercise its discretion, whether, with proper regard to the rights of all parties and especially when a bankrupt objects that he has already fully answered, an order for such examination ought to be granted.

It may not be easy to prescribe definite rules for the exercise of this discretion; it may depend more, as I think it does, upon the facts of each particular case, than is usual in appeals to courts for the exercise of discretionary powers. But where creditors have seasonable notice of the pendency of the proceedings; where a full and apparently thorough examination of the bankrupt has been had, and a final distribution made; a creditor's application for a further examination must be supported by a showing of some deficiency, stating it, in the former examination, which is now sought to be supplied, and the object for which it is sought; and in the absence of any such satisfactory showing, it will be presumed that the object of the application is not one which will be favorably entertained by the court. Creditors are,

perhaps, a little slow to admit that there are any honest bankrupts—as bankrupts are hasty to assume that all creditors are oppressive. The courts cannot sympathize in these general conclusions. A bankrupt who has made a full surrender of all his property, and is starting in his business life anew, has many very obvious difficulties to encounter, and his circumstances ought to be considered in any demand made upon his time and means (for, when required, he must attend at his own expense), in aid of the bankruptcy proceedings. The right of a creditor to a full disclosure, at any cost to the bankrupt, must be conceded and enforced when demanded. But the court must determine in any given case, when this right has been exhausted.

In this case, the examination of the bankrupt and his bookkeeper, which was conducted with unusual ability, covering apparently every subject which might throw light upon the business transactions and property of the bankrupt, and making over three hundred folios of testimony, was on file in the Register's office in October, 1874. In April, 1875, the bankrupt filed his petition for a discharge. Notice of this petition was first published on the 30th day of the same month, and on, or prior to the 13th of May, 1875, notice was forwarded by mail to the creditors who made the application now under consideration. They took no steps for any further examination of the bankrupt until the last day for filing specifications of the grounds of their opposition to his discharge. They do not in their application impeach the thoroughness or the good faith of the examination on file; they do not set forth, except in general and vague terms, any defect or ambiguity in it, or any lack of detail which needs explanation or amplification. They do not even specify any general ground of objection to the bankrupt's discharge, concerning which they need *data* to frame a sufficient specification, except the single one that Oberholser & Keefer were influenced by a pecuniary consideration to withdraw from and discontinue the examination. To this, it may be said that no offer was made to renew the examination after the

19th of October, and, so far as the files in my office shed any light on the transaction, the stipulation to discontinue related principally to the re-examination of the claim of Mrs. Frisbie, and only, as an incidental result, to the examination of the bankrupt. These creditors wait until the very last day when such an application as the one they made could be of any advantage to them; they are obliged to invoke, and they have received the favor of the court, to enable them to make it, and, owing to causes which cannot always be controlled, and for which no blame need be imputed to either party, these proceedings, on their motion, have now been pending nearly five months. The fact that such delays are, to a considerable extent, unavoidable in proceedings like these—the disadvantage of which, whoever may be the occasion of them—falls upon the bankrupt, is, as it appears to me, a sufficient reason why such applications as this, unless supported by positive and undeniable merits, ought to be denied.

I have not noticed the question, whether all that has been here said does not apply more properly to the issuing of the order on which the bankrupt and the witnesses were summoned rather than to the right of the bankrupt to refuse to be examined when actually before the Register, in obedience to the order. The point was expressly waived by the parties when before me, but, as a question of practice, it may be thought worthy of the attention of the court. Such orders are always granted *ex parte*. Convenience in practice makes it necessary that applications for such orders should be so entertained and disposed of; and being granted *ex parte*, the bankrupt, when appearing in pursuance to the order, should be allowed to make any objection, or raise any question which would be proper, if an opportunity to be heard had been afforded him before the order was granted. This practice, I think, a convenient one; and with this construction of the effect of the order, no injustice can result from it.

I am therefore of opinion that the creditors are not entitled to the general order for the examination of the bank-

rupt they have obtained; and that the objection of the bankrupt to an examination under it, ought to be sustained.

HOVEY K. CLARKE,
Register in Bankruptcy.

John J. Speed, for the creditors.
D. M. Dickinson, for the bankrupt.

BROWN, J.—The court directed an order to be entered approving the Register's opinion, and vacating the order for the examination of the bankrupt.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Although a note is executed and made payable in one State, yet if it is sent to another State to be there indorsed for the accommodation of the maker and discounted for his benefit, it is valid if the rate of interest is such as is allowed by the laws of the latter State.

A note given to compensate another for indorsing a note for the maker is valid.

THE PROVIDENCE COUNTY SAVINGS BANK, OLNEY ARNOLD AND ALFRED H. LITTLEFIELD, v. *JONATHAN F. FROST as Trustee in Bankruptcy of Elias Hotchkiss and the United States Trust Company of New York.*

F. N. Bangs, for plaintiffs.
J. E. Ludden, for the trustee.
Van Winkle, Candler & Jay, for the United States Trust Co.

BLATCHFORD, J.—This is a suit in equity brought to establish a claim for thirty-one thousand dollars and interest against the estate of Elias Hotchkiss, a bankrupt, adjudicated such by this court, and to have applied to the payment of such claim the proceeds of certain property which are on deposit, subject to the control of this court as a court of bankruptcy. The claim arises upon five promissory notes,

made by the bankrupt. Two of them, for twelve thousand five hundred dollars each, and one of them, for three thousand dollars, are held and owned by the Providence County Savings Bank, one of the plaintiffs, which is a corporation created under the laws of Rhode Island, and located and doing business in that State. The fourth note, for one thousand five hundred dollars, is held and owned by the plaintiff Arnold, and the fifth note, for one thousand five hundred dollars, is held and owned by the plaintiff Littlefield. The five notes are all of them dated "New York, March 14, 1873," and payable one year after date, "to the order of Olney Arnold" at "Bull's Head Bank" and signed by Elias Hotchkiss and indorsed "Olney Arnold" and "A. H. Littlefield." Arnold and Littlefield were duly charged as indorsers upon the three notes held by the bank. Arnold was duly charged as indorser upon the note held by Littlefield, and Littlefield was duly charged as indorser upon the note held by Arnold. To secure the payment of these five notes, Hotchkiss executed and delivered to Arnold on the 14th of March, 1873, a chattel mortgage, which was filed on the next day in the office of the Register of Deeds, etc., of the City and County of New York, covering certain personal property then in a hotel kept by Hotchkiss in the City of New York. Hotchkiss resided in New York and signed the notes and mortgage there. Arnold and Littlefield resided in Rhode Island. The mortgaged property has been sold by this court as a court of bankruptcy, and the disposition of the proceeds, which are on deposit in the United States Trust Company depends on the result of this suit. The defendant Frost, who is the trustee in bankruptcy of Hotchkiss, claims that the transaction was a New York transaction and is void for usury. The plaintiffs claim that it was a Rhode Island transaction and valid.

For the three notes held by the bank, amounting to twenty-eight thousand dollars, it gave, at its place of business in Pawtucket, Rhode Island, the sum of twenty-five thousand dollars, the note for three thousand dollars representing the

interest on the twenty-five thousand dollars for one year. It gave that sum as discounting the three notes for Hotchkiss and not for the indorsers. The application to the bank for the discount was made at the bank in Rhode Island by Arnold in person, who was treasurer of the bank and one of its trustees, and who stated at the time that the application was made on behalf of Hotchkiss. Hotchkiss was not in Rhode Island personally. Littlefield was one of the trustees of the bank. The two notes for one thousand five hundred dollars each were made as compensation to Arnold and Littlefield severally for indorsing the three notes which the bank discounted. The five notes were indorsed in Rhode Island by Arnold and by Littlefield. The discount was arranged for with the bank before the notes were indorsed and the twenty-five thousand dollars were paid by the bank after the notes were indorsed. Littlefield's indorsement on each note follows that of Arnold. He did not give Arnold anything for the notes in money or otherwise, nor did he give Hotchkiss anything for the notes. At the time Arnold and Littlefield agreed in writing with each other, that they should be holden to each other equally for the five notes, and should share equally any loss upon the notes, and that the mortgage, though made in the name of Arnold, should be held as security for the benefit of both of them, equally. Littlefield knew, at the time, that the notes were discounted by the bank for Hotchkiss. It was understood, at the time, by Littlefield, that there was no consideration for the notes, as between Arnold and Hotchkiss, and such was the fact.

On these facts it must be held that the contracts made by Hotchkiss by means of the notes, were made in Rhode Island and not in New York. The case is entirely like that of *Tilden* v. *Blair*, 21 Wall., 241. Hotchkiss made the notes in New York, and it may be conceded, for the purposes of this case, that the notes were made payable at a bank in New York, but the notes were not operative notes, as against Hotchkiss, until the three which the bank discounted were negotiated. Hotchkiss sent those three notes to Rhode Is-

land to have them indorsed and negotiated. The form of the notes and of the mortgage shows that Hotchkiss constituted Arnold his agent to accomplish that result. While the three notes which the bank discounted remained in the hands of Arnold, Hotchkiss was not holden upon any contract. Arnold had no rights as against Hotchkiss, but he was authorized to procure the three notes to be discounted, and thereby to initiate a liability not only of himself as indorser but of Hotchkiss as maker. It is, therefore, immaterial that Hotchkiss resided in New York, or made the notes in New York, or made them payable in New York. In legal effect he made the notes in Rhode Island at the time when the three notes were passed to and discounted by the bank. Before the notes had any operation, or became notes, Hotchkiss had sent them to Rhode Island, to have the three notes discounted there, and, it must be presumed, at such a rate of discount as by the law of that State was allowable. The rate in fact reserved was lawful in Rhode Island; and, the transaction being lawful and valid as to the three notes discounted by the bank, is lawful and valid as to the other two notes.

There must be a decree that the notes in question are valid and provable against the estate of Hotchkiss as debts secured by the mortgage in question; that the bank is entitled to have the funds in question applied first towards paying the notes for twenty-eight thousand dollars, with interest thereon at the rate of six per cent. per annum; that Arnold and Littlefield are entitled to have the residue of such funds applied towards the payment of the two notes held by them, with like interest, share and share alike; that Arnold and Littlefield are entitled to be admitted as general creditors for such balances, if any, as shall then remain unpaid, of their respective claims; and that the costs of the plaintiffs, and of the United States Trust Company, be paid out of the general funds of the estate in the hands of the trustee.

SUPREME COURT—NEW HAMPSHIRE.

A discharge does not release a bankrupt from his liability as surety on an injunction bond, when the proceedings in which the injunction has issued are not determined until after the granting thereof.

WILLIAM EASTMAN v. *ELISHA HIBBARD et al.*

LADD, J.—The replication shows that no cause of action accrued to the plaintiff on the bond, until more than five years after Morse was adjudged a bankrupt, and almost five years after his final discharge. The question is, whether the liability of the defendant as surety on the bond was discharged by his discharge in bankruptcy.

Section 19 of the Bankrupt Act of 1867, provides that "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained." It was obviously impossible for the plaintiff to avail himself of either of these provisions; the contingency did not happen before the order for the final dividend, and there was no basis upon which the present value of the liability could be ascertained and liquidated; whether any liability, contingent or otherwise, would ever arise upon the bond, could not possibly be ascertained at that time, and was not in fact ascertained till five years afterwards. It depended upon whether the proceeding in which the injunction was issued should be determined in favor of Hibbard or this plaintiff. The claim was not provable under the act, and it is not to be presumed that Con-

gress intended a result so manifestly unjust as that it should be barred by the discharge. Section 19 of the Act of 1867, is to the same general purpose as Section 5 of the Bankrupt Act of 1841, and the English act of 6 Geo. 4, Ch. 16, namely, to provide for the proof of contingent debts and demands. Cases decided under the provisions of those acts may therefore be considered as in point. I will refer particularly to but one, *Woodard* v. *Herbert*, 24 Me., 358. There a debtor was arrested on a mesne process, and gave a bond in common form to procure his release from arrest; the surety in the bond then filed his petition, and was decreed to be a bankrupt; next, judgment was rendered in the action, and the bond became forfeited by the neglect of the principal to perform the condition thereof; and afterwards the bankrupt received his certificate of discharge. It was held that such certificate furnished no defense to a suit on the bond. Shepley, J., delivering the judgment of the court says: "It is necessary to distinguish between a contingent demand, and a contingency whether there will ever be a demand. * * * In the case of a bond made to release from arrest on mesne process, there is no obligation to pay the debt in any event, if one should finally be established. It only obliges the surety to cause the principal to do a personal act, and in case of failure, to make compensation in damages wholly unliquidated and incapable of estimation, before the effect produced by the failure of performance of the personal act can be perceived. It would seem to have been impossible to fix any value upon such a personal obligation. Upon what principles could a court direct a valuation of the chances that the plaintiff would recover judgment, and that the defendant in that suit would neglect to notify and disclose as the statute requires?" This reasoning is entirely applicable to the present case. *Goodwin* v. *Stark*, 15 N. H., 218, is much in point, as are also the English cases of *Hinton* v. *Acraman*, 2 M. G. & S., 367; *Hankin* v. *Bennett*, 8 W. H. & G., 107; *Parker* v. *Ince*, 4 H. & N., 53, cited by plaintiff's counsel, and *McDougal* v. *Paton*, 8 Taunt., 584.

We are of opinion that the replication shows a good answer to the plea, and that the demurrer must be overruled.

SUPREME COURT—VERMONT.

A plea in bar that since the commencement of the suit the defendant has been adjudged bankrupt, and the plaintiff has proved his debt in bankruptcy, and that the bankruptcy proceedings are still pending, is insufficient.

THE BRANDON MANUFACTURING COMPANY v. *A. A. FRAZER & CO.*

WHEELER, J.—The first clause of the 21st Section of the Bankrupt Act of 1867, as it stood before the late amendments, and when the judgment under revision was rendered, provided, "that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby." These provisions standing alone would be very direct and effective against maintaining any suit against a bankrupt upon a debt proved against his estate. But they are to be read in connection with the other provisions of the act, and not alone, and their effect is to be determined from the meaning of the whole. The act provides for a discharge to bankrupts, excluding corporations and joint-stock companies; and also provides what the effect of the discharge shall be when granted. If the proceedings terminate without a discharge, the bankrupt is liable to a judgment *in personam* upon any cause of action that existed before the bankruptcy, and is liable to have it satisfied out of his after-acquired property. (*Fisher* v. *Currier*, 48 Mass., 427; *Haxtun* v. *Corse*, 2 Barb. Ch., 506.) This applies as well to

proved debts as to those that are provable, and not proved, and shows that proof of debts does not merge or extinguish them absolutely, but only so suspends their vitality that no action can be carried to final judgment upon them during the pendency of the bankruptcy proceedings. The proof of debts must generally, if not always, precede the granting of a discharge; and full effect could not be given to the rights of a creditor to prove his debt, and also to proceed against after-acquired property in case no discharge shall be granted, if the bankrupt could, during the pendency of the proceedings in bankruptcy, that might terminate in a discharge and might not, plead the proof of the debt as a full bar to an action upon it. The English bankrupt acts, 49 Geo. III., 121, Section 14, provided that it should not be lawful for a creditor who had brought an action against a bankrupt upon a provable debt, to prove it, "without relinquishing such action," and that the proof of such debt should be "deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed." In an action on such a debt, the bankrupt pleaded the proof of the debt in bar, and the plea was held good, and judgment rendered for the defendant. (*Read* v. *Sowerby*, 3 Maule & Selw., 78.) Afterwards the same question came before the King's Bench again upon a similar plea, and notwithstanding the case of *Read* v. *Sowerby*, it was held that the plea was not a good bar. Best, J., said: "To make it a good bar, the debt must be extinguished. Now here there was no extinguishment of the debt: for if the commission had been superseded, the party would clearly have had a right to bring an action. The proper course in such a case for the party to pursue is, either to apply to the chancellor to expunge the debt, or to the court in which the action is brought to stay the proceedings." (*Harley* v. *Greenwood*, 5 B. & Ald., 95.) Under the Bankrupt Act of 1841, which contained similar provisions, it was held, according to some authorities, that proof of a debt merely, was not a bar to the claim. (*Haxtun* v. *Corse, supra.*) The same doctrine has been held in several cases under the present

Act. (*In re* Rosenberg, 2 N. B. R., 236; 8 Am. Law Reg., N. S., 242; *Hoyt et al.* v. *Freel et al.*, 4 N. B. R., 131; Bump, Bank., 375.) On this argument, the late case of *Bennett et al.* v. *Goldthwait*, 109 Mass., 494, where it appears to have been held that proof of a debt in bankruptcy was a full defense to an action pending upon it at the time of proof, has been cited in behalf of the defendant, and carefully examined, on account of the great consideration always due to decisions of that court. That decision appears to have been largely made on the authority of some cases under the Act of 1841, in which the learned judges in deciding them, enunciated or gave countenance to such views; but an examination of those cases shows that this question was not directly involved in any of them. In one of them, Comstock's case, 22 Vt., 642, the question was whether a bankrupt in custody on a close-jail execution, was entitled to a release on proof of the debt against his estate; and what Prentiss, J., said, was upon that question, in holding that he was entitled to be immediately discharged from that custody. In another, *Everett* v. *Derby*, 5 Law Rep., 225, the point was, whether the pendency of a suit on one demand, would prevent the plaintiff in that suit from proceeding in bankruptcy against the defendant on another demand; and the remarks of Ware, J., were made upon that question. In another, *Humphrey* v. *Suett*, 31 Me., 192, the effect of a discharge, and not of proof of a debt in bankruptcy, was involved. Notwithstanding the great respect to which the decisions of the court that made, and the opinions of the learned judge that pronounced, the decision in *Bennett et al.* v. *Goldthwait*, are justly entitled, that decision, considered with the others that have been mentioned, does not satisfy this court that the construction there put upon that part of the Bankrupt Act is the correct one. No other case in which mere proof of a claim has been held to be a good bar, has been produced in argument, and none other has been discovered, except *Read* v. *Sowerby*, before mentioned. *Ansonia Brass and Copper Co.* v. *New Lamp Chimney Co.*, 10 N. B. R., 355; 53 N. Y., 123, has been referred to

as impliedly giving countenance to such a plea by a bankrupt person, by holding that it would be bad for a bankrupt corporation, because the corporation could not be discharged. And Mr. Justice Nelson appears to have held that proof of a debt of a class that, under Section 33, would not be barred by a discharge, would not be a bar to a suit upon the debt. (*In re* Robinson, 6 Blatch., 2 N. B. R., 342.) But a person adjudged a bankrupt may not be discharged from any debts. Corporations are not distinguished from persons, nor debts not barred by discharge from those that are, in Section 21; and if proof of a debt would not be a bar for a defendant that could not be discharged, it should not be for one who might not be discharged while the question of discharge is pending. This Section 21 does make a distinction between creditors who prove their debts and those who do not, but not such as to show that the debts of the former are barred without a discharge, and of the latter, not. The act as it stood before late amendments, left liens by attachment that should be four months older than the bankruptcy proceedings, unimpaired by the proceedings, if the creditor should choose to stand upon his attachment (Section 14). And if the creditor choose to so stand, he could have a judgment to hold the property attached, although the bankrupt should obtain and plead his discharge in bar of the action. (*Stoddard* v. *Locke*, 9 N. B. R., 71; 3 Vt., 574.) The intention of the act seems to have been, that an ordinary creditor who had commenced suit should not have the benefit of such a lien, and also prove his debt, and share with the other creditors in the rest of the estate; and the distinction made in Section 21, between those who prove their debts and those who do not, and providing that all previous proceedings and unsatisfied judgments therein of a debtor who proves his debt shall be surrendered and discharged by the act of proving it, appears to have been made to carry out that intention. (Comstock's case, *supra*). The previous proceedings of a creditor proving his debt, so far as they can in any way affect the estate of the bankrupt, are, doubtless, by the mere act of proof, discharged and surren-

dered; but the debt itself remains as well as that of a creditor who does not prove, to await the result of the proceedings in respect to discharge. The debt, therefore, should not be barred by a judgment for the defendant upon a plea of proof of it merely, but should be held in suspension until the termination of the proceedings in respect to the discharge; one way or the other. The plea in this case sets forth proof of the debt merely, and is pleaded in bar of the action. The *pro forma* judgment that the plea was insufficient, was correct. On motion of the defendants, the judgment is reversed, *pro forma*, and the cause remanded, with leave to withdraw the demurrer, and replead on the usual terms.

SUPREME COURT—NEW HAMPSHIRE.

Where a judgment is taken by default without a continuance, and the case is promptly brought forward at the next term, and judgment entered thereon, the lien of the attachment is not lost.

The delivery of attached property to a receiptor does not divest the lien of an attachment, so long as the property remains in the hands of the receiptor or the debtor.

In an action by a sheriff to recover the value of property subject to an attachment-lien, the defendant cannot interpose a mortgage as a defense unless it is shown that the property was restored to the mortgagee.

An assignment under a State Insolvent Law is void.

The lien of an attachment upon property delivered to a receiptor, follows the property into the hands of the debtor's assignee.

By appearing and filing a plea, the assignee waives the want of notice before the bringing of the suit.

If an assignee appears in a State court in an action brought to enforce a lien against the bankrupt's estate, execution may be stayed in order to give the parties an opportunity to apply to the District Court.

SAMUEL ROWE v. *CALVIN PAGE.*

ISAAC W. SMITH, J.—*First.* Did Millard & Curran's attachment expire in thirty days after the adjournment of the April Term?

At the time Mason & Seavey were adjudged bankrupts, Millard & Curran had a lien on certain property of the bankrupts, created by an attachment thereof more than four

months prior to the commencement of proceedings in bankruptcy against them, and therefore valid under the Bankrupt Act of the United States. Was this lien in any way lost? If it was lost by reason of the default entered at the April Term, 1873, and of the docket entry of "judgment *nisi*," it was lost without the act, consent, or knowledge of Millard & Curran, or of their counsel.

Property attached is holden for a period of thirty days from the time of rendering a judgment in the action in favor of the plaintiff on which he can take execution. (Gen. Stats., Ch. 205, Section 36.)

Actions are often continued after default has been entered, for the purpose of saving an attachment. This was formerly necessary where there were prior attachments of the same property. When an action has been defaulted, the plaintiff may take judgment at any time afterwards, as of the term when the default was entered, if the action was not continued for judgment. But if he takes a judgment more than thirty days after the end of the term when the default was entered, his attachment becomes thereby dissolved. But it is held that there are cases where the court permits actions in which the defaults have been entered without continuances to be brought forward upon the docket at subsequent terms, in order to save attachments. Such permission, however, is by no means a matter of course. Unless the application for the purpose be promptly made at the next term, and upon the most satisfactory grounds, the permission will not be granted, or, at least, will not be granted without so restricting it that it shall not be to the prejudice of third persons." (*Hackett* v. *Pickering*, 5 N. H., 19.) In this case, the defendants were not defaulted until the last calling of the docket, in the absence of the plaintiffs' counsel, without his knowledge, and after he had left, having every reason to suppose the action would be continued. Application to bring the action forward upon the docket was seasonably and promptly made at the next term. The entry of "judgment *nisi*," is not equivalent to rendering a judgment. It is a minute placed

upon the clerk's docket that a judgment might be entered up for the plaintiffs, *unless* some other disposition should be made of the case; generally such disposition would be a continuance. In this case no judgment was entered up, none was rendered, and nothing further was done till the next term, when by order of the court it was brought forward, and judgment rendered for the plaintiffs upon the default. By the statute, the lien created by the attachment does not expire till the end of thirty days from the rendition of the judgment, and not from the entry of the default. The case answers perfectly the requirements of *Hackett* v. *Pickering*. A default was entered without a continuance. Application was made promptly at the next term that it be brought forward, and the reasons therefor are most satisfactory. We are of the opinion that the plaintiffs did not lose their attachment, but that the same was preserved, and that the rights of third persons (and there are no third persons here objecting, nor were there any at the time), were not prejudiced by bringing the action forward at the October Term, and reinstating it upon the docket for the purpose of rendering judgment therein. Even if this were otherwise as to third persons, so far as *Mason* v. *Seavey* and their legal representatives are concerned, there can be no doubt that the attachment was not lost.

Second. What was the effect upon the plaintiffs' attachment, of the restoring of the property attached to the debtors by the receiptor? By the terms of the receipt, it was to be delivered to the officer. The receiptor is not regarded as the mere servant of the officer. His undertaking is a security for the debt to the extent of the property. So long as he retains the possession of the property, it may be reclaimed by the officer to satisfy the execution, or to restore it to the debtor, or because he is not satisfied with the responsibility of the receiptor. The receiptor may, if he chooses, restore the property to the debtor, and suffer him to dispose of it, but he thereby deprives himself of the power of returning it to the officer, and the officer is entitled to recover its value

of him upon a lawful demand. If the property is thus restored to the debtor, and sold by him, the officer cannot then retake it by virtue of the attachment. (*Clark* v. *Morse*, 10 N. H., 236; *Carpenter* v. *Cummings*, 40 N. H., 158; *Houston* v. *Blake*, 43 N. H., 115; *Treadwell* v. *Brown*, *Ib.*, 290; *Cooper* v. *Newman*, 45 N. H., 339.)

Where the receiptor has permitted the debtor to hold and use the property as owner, the attachment is regarded as dissolved so far as that it may be attached by another officer who has no notice that there is a prior attachment still subsisting. (*Whitney* v. *Farwell*, 10 N. H., 9; *Dunklee* v. *Fales*, 5 N. H., 527; *Bayley* v. *White*, 4 Pick., 395.) But it is still in force for the security of the first attaching officer until such second attachment be made, and he may again seize the property by virtue of his first attachment, and may take it from the possession of the debtor as well as from the receiptor. (*Whitney* v. *Farwell*, *supra*.) As between the sheriff and the debtor, the special property acquired by the seizure of the goods still subsists; and although the sheriff does not remain with them, nor place them in the custody of another, yet as to the debtor, the officer is deemed to have retained the possession of them, and his lien is regarded as subsisting. (*Houston* v. *Clark*, *supra*; *Treadwell* v. *Brown*, *supra*.)

An attachment will not be defeated by the fact that possession was not retained by the officer, as against the debtor, or any one having notice that the attachment had been made and was still subsisting, and when a purchaser is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry. (*Cooper* v. *Newman*, *supra*.)

From these authorities it will be seen that the plaintiffs who made this attachment could retake the property from the receiptor or from Mason & Seavey, the debtors, unless it had been attached by some other officer, or had been sold to some third person without notice of the prior attachment, and in case of a conversion of the goods by the debtors, or by a purchaser with notice, the officer could maintain an action

therefor against them. Mason & Seavey sold parts of the two mowing machines. As to the parts sold, the lien created by the attachment, as to the purchaser, was thereby lost. As to the unsold portions of the mowing machines, and the six plows, the attachment still subsisted, unless affected by the mortgage, assignment, or proceedings in bankruptcy.

Third. The reserved case finds that "the defendant intended to regard the mortgage as fraudulent." It is not necessary to inquire whether he is now estopped to deny its fraudulent character. We do not understand that he claims to interpose the mortgage as a defense to this suit. Even if no question were raised as to its validity, it would be no defense to this suit, unless it was shown that the property was restored to the mortgagees so as to exonerate the officer. (*Scott* v. *Whittemore*, 27 N. H., 309.)

Fourth. The laws of this State, under which Mason & Seavey assigned all their property to the defendant, August 8, 1872, for the benefit of their creditors, were not in force, but were suspended by the United States Bankrupt Law, which went into operation June 1, 1867, and have remained suspended since that time. (*Chamberlain* v. *Perkins*, 51 N. H., 336.) No valid assignment could therefore be made.

Fifth. The remaining question is, whether the proceedings in bankruptcy have vacated the plaintiffs' attachment. By the 14th Section of the Bankrupt Act of 1867, the conveyance by the court or Register to the assignee of the bankrupts' estate, relates back to the commencement of the proceedings in bankruptcy, and dissolves any attachment on mesne process "made within four months next preceding the commencement of said proceedings." As against the bankrupts, this attachment was not dissolved. Does their assignee stand differently? Under the Bankrupt Act, by the conveyance to the assignee, all the estate, except what is exempted, vests by operation of law in the assignee, subject to any liens or other lawful claims thereon. From these various provisions of the Bankrupt Act, it is manifest that the assignee is clothed with the same rights that the bankrupt

possessed. He is substituted for the bankrupt, stands in his place, succeeds to all his estate and rights, and represents him in all legal proceedings. The statute nowhere confers upon him higher powers, or rights, and it would be difficult to conceive how it could transfer to him what the bankrupt did not own or possess, even if Congress had attempted so to do. "The doctrine that an assignee in bankruptcy takes only the title of his assignor is now generally recognized." (*Ex parte* Dalby, 1 Low., 431.) The assignee in bankruptcy stands in the place of the bankrupt, and takes only the property which he had, subject to all valid claims, liens, and equities. (*Ex parte* Dalby, *ex parte* Ames, 1 Low., 561.) "Assignees in bankruptcy (under the Act of 1867) stand no better than the bankrupts in respect to the assets, excepting in cases of fraud, or of attachments of less than four months' standing. Where, therefore, the bankrupts, manufacturers of locomotive engines, would have been estopped to deny that a particular engine in their shop was the property of a particular customer, the assignees will be equally estopped. Where the manufacturers obtained their pay for an engine on the false representation that it had been finished and delivered to a carrier to be delivered to the customer, and they afterwards built such an engine as had been ordered, and marked it with the customer's name, but had not sent it from the shop at the time of their bankruptcy: Held, that the customer had acquired a title to the engine by estoppel, which he might enforce against the assignee in bankruptcy." (*Ex parte* Rockford, etc., R. R. v. *McKay & Aldus*, 3 N. B. R., 50; 1 Low, 345.)

The authorities upon this point are numerous. (*Camack* v. *Bisquay*, 18 Ala., 286; *ex parte* Newhall, assignee of Brown, 2 Story, 360, *Strong* v. *Clawson*, 10 Ill., 346; *Winsor* v. *McLellan*, 2 Story, 492; *Mitford* v. *Mitford*, 9 Ves., 87; *Sherrington* v. *Yates*, 12 M. & W., 855.)

It was not necessary that Page should have knowledge or notice of the existence of the attachment. Representing the bankrupts, their knowledge was his knowledge—construct

ively, at least. We are of the opinion that, as against the assignee of Mason & Seavey, the attachment was not dissolved.

By the 14th Section of the Bankrupt Act of 1867, it is provided that "no person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so." The defendant has not objected that this provision of the statute has not been observed. If it has not been, and he had seasonably objected, this action could not be maintained. It may be that the requisite notice was given, but the case is silent upon that point. But, however that may be, we think it is now too late to make the objection. A defendant, by waiving exception, admits himself rightly in court. By his appearance and plea, he admits the jurisdiction of the court over him as a party. If the jurisdiction is admitted, the judgment cannot be questioned except for want of jurisdiction of the subject-matter. It is well settled that a party who desires to take advantage of any defect in the proceedings by which he was brought into court, must make his exception by plea in abatement, or a proper motion at the earliest stage of the proceedings, or he will be deemed to have waived it, and to have closed his own mouth against objecting afterwards. (*Nichols* v. *Smith*, 26 N. H., 298, and authorities there cited.)

According to these views, the plaintiff is entitled to judgment for the amount of the judgment recovered by Millard & Curran against Mason & Seavey, and interest and costs, as provided by the reserved case. By the provisions of the Bankrupt Act of 1867, Section 1, original jurisdiction (which is not necessarily exclusive) is conferred upon the United States District Court in controversies in regard to the collection of all the assets of the bankrupt, and to the ascertainment and liquidation of the liens thereon. The assignee is

an officer of the bankruptcy court, subject to its orders in regard to the disposition of the assets in his hands, and liable to punishment for disobedience. Both parties appear in court here and raise no objection to the jurisdiction of this court, and therefore we have not considered any question of jurisdiction. But, in order that there may be no conflict between the State and Federal courts, we think execution should be stayed till the further order of this court, and the parties may consider whether any application to the United States District Court for this district is necessary in the premises. When the courts of the United States sitting in bankruptcy, abstain from ascertaining liens and providing for their satisfaction out of the property or the proceeds of a sale thereof, the only way of enforcing such liens is by suit in the State courts. (*Clifton* v. *Foster*, 3 N. B. R., 366; 103 Mass., 233.) The State courts are bound to observe the requirements of the Bankrupt Act, and the Federal courts are equally bound to respect the liens which are protected by said act. Without intending to establish a settled rule or system of practice on the subject, but as a matter of discretion in this case, we think the course suggested is the proper one to be pursued here.

Judgment for the plaintiff, and execution stayed.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

A creditor who has filed a creditor's bill in a State court, and obtained the appointment of a receiver prior to the commencement of the proceedings in bankruptcy, may be enjoined from proceeding further in the State court.

Proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which have been obtained by any creditor by the use of diligence.

In re R. M. WHIPPLE.

THIS was a rule to show cause why certain judgment-creditors of the bankrupt should not be enjoined from pro-

ceeding under creditors' bills against the bankrupt in the State courts, and from enforcing an assignment by the debtor to the receiver appointed in such creditors' suits. On the 8th day of August, 1874, Louis Stix and others filed in the Circuit Court of Cook county an ordinary creditors' bill, to enforce a judgment against Whipple previously recovered in that court. On the 4th day of November, 1875, a receiver of the debtor's effects was appointed in that suit, and the debtor was ordered to make an assignment of his effects to such receiver. On the 10th day of July, 1875, the Chatham National Bank and others filed a similar creditors' bill in the Superior Court of Cook county, upon judgments previously recovered therein against Whipple, and upon the 5th day of November, 1875, a receiver was appointed, and the debtor was ordered to assign his effects to such receiver. On the 24th day of November, 1875, and before the debtor had executed an assignment to the receiver in either creditors' suit, an involuntary petition in bankruptcy was filed against him in this court, on which he was adjudicated a bankrupt on the 6th day of December, and delivered his property to the marshal under the warrant in bankruptcy. The judgment-creditors in each of the suits in the State courts above named, having taken proceedings therein against Whipple to enforce an assignment to the receiver appointed in each case, a rule was granted against them in this court to show cause why they should not be enjoined from further proceeding in the State courts.

E. & A. Van Buren and *Tenneys, Flower & Abercrombie*, Solicitors for the judgment-creditors.

Edwin Bean and *Geo. W. Smith*, Solicitors for the petitioners.

J. L. High, Solicitor for the bankrupt.

BLODGETT, J.—This question came before me in the case of the National Insurance Company, which was also a case where a creditors' bill had been filed in the State court, on which a receiver was appointed, and took possession of the

assets of the company, and proceedings in bankruptcy were then instituted against the company. I had occasion to investigate the question very thoroughly in that case, and after a very careful examination, in the light of the authorities, both in this country and in England, I came to the conclusion that the proceedings in bankruptcy superseded the creditors' bill; and that the receiver in the chancery suit would be obliged and could be compelled to deliver the property over to the assignee in bankruptcy, subject, of course, to all the rights which the creditors whom he specifically represented had obtained, and to all the priority which they had obtained by their diligence. I announced my conclusion in that case, and the parties acquiesced in it.

This class of cases of course brings up the difficult question of collision between the jurisdiction of the several courts, and I see no way of harmonizing it except to assume, that when proceedings in bankruptcy are properly instituted and take effect, they must of necessity supersede the proceedings on creditors' bills, subject, of course, to all the rights which the parties may have acquired by the steps taken. Now, if Judge Van Buren's client obtained a judgment in 1873, that judgment is *ipso facto* a lien upon the real estate of the debtor, and if anything is realized out of his real estate, this lien would have to be respected. Then, if he had acquired possession of any assets through his receiver, undoubtedly, to the extent that assets had come into the receiver's hands, the authorities require the Bankruptcy Court to respect the lien thereby obtained.

How far we are to go in enforcing what counsel characterizes as an equitable lien, simply by their having instituted proceedings in chancery, and obtained the appointment of a receiver, is a question upon which I would prefer to reserve an opinion, until we come to distribute the estate. That is a question that has never been fairly up. It is presented by Mr. Tenney in this case, he claiming that by their diligence in filing the creditors' bill, they have acquired a sort of blanket-lien on the whole property. It seems to me utterly

impossible to carry on the two administrations together; the estate should be administered in one court, and I think the Bankrupt Court the proper one. The assignee in bankruptcy necessarily, and by operation of law, takes possession of the assets, subject to the existing claims or liens of the creditors in the State courts. And I think that the better authority and the more reasonable doctrine is, that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which are obtained by any creditors by the use of diligence, which are to be respected, and which should be paid in the order of priority, according to whatever rights have been obtained. Now, in this case, the receiver in the State court has obtained no property. The bankrupt reports to this court that he has turned over all his assets of every nature to the marshal of this court, under the warrant of seizure in bankruptcy. Under these circumstances, the Bankruptcy Court must go on and administer the estate, leaving these judgment-creditors to assert their claims and priorities, if any, in this court. The question is not a new one, but has been frequently up, and until it is overruled by the Supreme Court, I shall insist upon this construction of the law.

Let the rule to show cause be made absolute, and the judgment-creditors be enjoined from proceeding in the creditors' suits in the State courts, reserving all questions as to the priorities which they have there acquired to be determined by this court hereafter.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

It is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against partners, or only one, for everything is conducted in the same way, and the rights of creditors and all others are precisely the same.

If a partner after a formal dissolution continues to carry on business under the

firm name, with the consent of his co-partner, his trade assets should be treated as joint assets.

Where partners file separate petitions, the firm creditors must be postponed to the separate creditors, in the distribution of the separate estate, whether there are joint assets or not.

In re EDWARD P. MORSE.

Perry & Creech, for the assignees.

Bumpus & Johnson, for the creditor.

LOWELL, J.—The question whether Jewett & Pitcher can prove a debt of eight thousand three hundred and eighty-three dollars and eighteen cents against the estate of Morse, is submitted upon an agreed statement of facts, which is somewhat meager. If I misunderstand the facts, there will be an opportunity to correct me. As I read the statement, Morse was a member of the firm of Morse & Haskell, lumber-dealers in Charlestown, and carried on, besides, a separate trade at Methuen. Both partners were made bankrupt, but by separate petitions, and the cases have been carried on together substantially as one.

It is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against two partners, or only one; everything is conducted in the same way, and the rights of creditors and all others are precisely the same. It is agreed that at some time before bankruptcy the firm of Morse & Haskell was dissolved, but when this was done is not stated. It does appear, however, that no notice of dissolution was given, and that Haskell continued to trade as Morse & Haskell, and, I infer, with Morse's consent. Haskell has no separate creditors to any amount, and all the firm debts have been proved in his case, and a dividend has been paid.

Jewett & Pitcher hold a note of Morse & Haskell, which they have thus proved against Haskell's estate, and have received a dividend. They stand, therefore, like all the other joint creditors, and the question is whether they can share in the separate estate of Morse. It is said, in the agreement of facts, that there is no joint estate, and no solvent partner.

If this were so, it would not, in my opinion, change the decision at all, for reasons I have given some years since, at large. But the fact is not so, or rather the inference from the other facts negatives this. If there was a formal dissolution as between the partners, and no notice given, and the name of Morse was continued with his consent, I think there was in law no dissolution, and that the creditors of the firm have the right, which it seems they have enjoyed, of proving against the goods which Haskell, so carrying on the business, had in that business. His trade, assets have been treated as joint assets, and I think properly.

Joint creditors, then, on any interpretation of the law as applied to the marshaling of the assets, cannot share the separate estate of Morse until his separate creditors have been paid in full.

Proof suspended until separate costs have been paid in full.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Registers may take cognizance of uncontested petitions filed by attorneys against the assignee, to compel the payment of their fees and disbursements.

In re HENRY H. STAFFORD.

On exceptions to the decision of the Register refusing to act on the petition of William H. Parks for an order requiring the assignee to pay him seventy-five dollars for his services in making the schedules filed by the bankrupt. Similar exceptions were filed to the decision of the same Register declining to act on a petition of the same parties in the case of the Michigan Iron Company, for an order allowing a claim for professional services, disbursements, expenses, and fees, incurred in obtaining an order restraining certain sales of the bankrupt's property on execution. The Register declined to act upon these petitions, on the ground that they should

have been brought before the court, and that he had no authority to act unless under a special order of reference.

BROWN, J.—By Section 4 of the Bankrupt Act, in which the powers of Registers in bankruptcy are defined, after the enumeration of certain specified matters, a general power is given them "to sit in Chambers, and dispatch, there, such part of the administrative business of the court, and such uncontested matters as shall be defined in general rules and orders," to be made by the Supreme Court. This power given to the Supreme Court it had not exercised in its general rules and orders adopted prior to April, 1875, but the power of the Register to act upon petitions of this kind was, notwithstanding, asserted by the District Court of Southern New York. (*In re* Joseph M. Lane, 2 N. B. R., 309, 3 Ben., 98.) In the opinion of Judge Blatchford, the power of the Register to make an order, upon the petition of the solicitor for the bankrupt, directing the assignee to pay certain fees of officers, was embraced within the power given by Section 4, "to make all computations of dividends and all orders of distribution," and "to audit and pass accounts of assignees," and under the power given him by General Order No. 5, to conduct proceedings in relation to "taking evidence concerning expenses and charges against the bankrupt's estate, auditing and passing accounts of assignees, and proceedings for the declaration and payment of dividends."

This case was followed by my learned predecessor (*In re* Noyes, 6 N. B. R., 277), where the question arose upon the application of the assignee for the settlement of his account, and the power of the Register to hear such application was affirmed. In the case of Myron Rosenburg, 3 N. B. R., 73, the attorneys for the bankrupt applied to the Register for an order of payment by the assignee of the bill of items of disbursements for clerk's, Register's, and marshal's fees, etc., to which the assignee objected that the bankrupt had paid his attorneys a sufficient sum to cover those items. In this case Judge Blatchford held that the matter should be brought

before the court by petition, which would then be referred to the Register to take testimony. This was probably because the application was contested. Whatever doubts may have existed under General Order No. 5, prior to April, 1875, with respect to the power of the Register in uncontested matters of this kind, are resolved by the amended order adopted at that date.

By this order, the power already given to the Supreme Court by Section 4, and never, until then, exercised, was assumed by the Supreme Court, and the duties of the Register extended to the dispatch "of all administrative business of the court in matters of bankruptcy, and making all requisite uncontested orders therein which are not by the Acts of Congress concerning bankruptcy required to be made, done or performed by the District Court itself," subject, however, to the control and review of this court. By the amendment of General Order No. 8, adopted at the same time, it was provided that "if any party interested adversely to such order shall not, before the hearing of the application therefor, give reasonable notice in writing to the Register that he intends to contest the same, and objects to its being heard by the Register, the same shall be heard by the Register as by consent." The language could scarcely be broader. It applies to all uncontested orders concerning the winding up of the bankrupt's estate, which are not required to be specifically made by the court, and I think clearly embraces the petitions in question.

The exceptions to the decision of the Register are therefore sustained, and an order will be entered directing him to act upon the petition in each case.

SUPREME COURT—IOWA.

An attachment issued out of a State court within four months before the commencement of the proceedings in bankruptcy is dissolved.

If an attachment is laid in the hands of a garnishee prior to the period of

four months next preceding the commencement of the proceedings in bankruptcy, it is not dissolved.

Merely proving a secured claim as a general claim, does not waive the security.

HATCH v. *SEELY.*

MILLER, J.—No personal judgment was rendered against the appellant. The court, however, ruled that the proceedings in bankruptcy did not affect the lien of the writ of attachment, which had been levied on defendant's property prior to the filing of his petition in bankruptcy. The 14th Section of the National Bankrupt Act provides, "That as soon as said assignee is appointed and qualified, the judge, or where there is no opposing interest, the Register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, *although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings.*" (U. S. Statutes at Large, Vol. XIV., 522.)

When an adjudication of bankruptcy is made, following the filing of a petition, it is then judicially established that the filing of such petition was the commencement of the bankruptcy proceedings. (*In re* Patterson, 1 N. B. R., 125.) The filing of the petition, followed by an adjudication of bankruptcy, being the commencement of the proceedings, the provision of the Bankrupt Act, above set out, is to the effect that the conveyance to the assignee in bankruptcy, which is made during the proceedings, operates, not only to vest in such assignee all the estate, real and personal, of the bankrupt, but also to dissolve any attachment upon such property made within four months next preceding the filing of the petition.

In re C. H. Preston, 6 N. B. R., 545, an attachment from a State court levied February 20, 1871, was held dissolved from the filing of the petition on the 18th day of March, 1871, an order of adjudication being subsequently granted.

In *Corner* v. *Mallory*, 31 Md., 478, it is held that, Congress has the power, by operation of the General Bankrupt Law, to divest the conditional lien acquired by the levy of an attachment; that the 14th Section, above quoted, was intended to fix a period within which no preference should be gained by one creditor, by attachment, over the claims of the other creditors of the bankrupt, and that an attachment made after the passage of the act, and within four months next preceding the commencement of proceedings in bankruptcy, was dissolved thereby. As holding the same doctrine, see also, *In re* Housberger *et al.*, 2 N. B. R., 92; *In re* Williams, 3 *Id.*, 83; *In re* Joslyn *et al.*, *Id.*, 473; *Stuart* v. *Hines & Eames*, 6 N. B. R., 416; 33 Iowa, 60, and cases there cited; *In re* Brand, 3 N. B. R., 324. But an attachment made prior to the period of four months next preceding the commencement of proceedings in bankruptcy is not dissolved by such proceedings. The attachment in such case remains in full force. The lien of the attachment may be enforced by any appropriate proceedings which do not involve a judgment *in personam* against the bankrupt. A judgment to be enforced only against the property thus attached may be entered, even though a discharge has been granted, and is pleaded in bar of the action, as in this case. (*Bates* v. *Tappan*, 3 N. B. R., 647; s. c., 99 Mass., 376; *Bowman* v. *Harding*, 4 N. B. R., 20; 56 Me., 559; *Samson* v. *Burton et al.*, 4 N. B. R., 1; *Leighton* v. *Kelsey et al.*, 4 N. B. R., 471; 57 Me., 85.)

The attachment of the land in controversy in this case, according to the statements of both parties, was made within four months next preceding the commencement of the proceedings in bankruptcy, although the writ issued prior to that time. The proceedings in bankruptcy operated therefore to dissolve the attachment, so far as the same was a lien on the real property attached. The attachment of the gar-

nishees, however, was made prior to the period of four months next preceding the commencement of the proceedings in bankruptcy, and the lien thus created was not removed, nor the attachment thus made dissolved by those proceedings.

It is insisted, however, that the plaintiff appearing before the court in bankruptcy, and proving up his claim as a general creditor of the bankrupt, thereby waived his lien and right to proceed in this action. *In re* Bloss, 4 N. B. R., 147, which was a case in the United States Circuit in Michigan, it was held that a creditor who has a lien upon the property of his debtor by virtue of a judgment, execution and levy, or by garnishment, who files a petition for adjudication of bankruptcy against the debtor, without reference to such lien or security, thereby waives and relinquishes the same, and stands before the court as an unsecured creditor. And, in *Stewart* v. *Isador et al.*, 1 N. B. R., 485, it was held that, under Section 21 of the Bankrupt Law, if a creditor prove his full claim without reference to his lien or security, and without apprising the Bankrupt Court of its existence, such an act is a waiver of the lien and a relinquishment of the security to the assignee. It is there said that, "Otherwise, the creditor, besides realizing on the collateral, might receive a dividend upon his entire debt, and thus reduce the dividend to which other creditors would be entitled, in case his debt had been placed upon a proper footing." *In re* Brand, 3 N. B. R., 324, however, it was held that, where a creditor filed proof of his claim before the Register in bankruptcy, stating that it was secured by trust deed, he did not thereby waive his lien. The view taken by the learned judge in that case was, that under the 20th and 21st Sections of the Bankrupt Act, before the creditor could be admitted to prove his debt as a general creditor, he should have released and conveyed his lien to the assignee, that such release was essential to the waiver of his lien, and that without such release the claim should be disregarded by the Bankrupt Court. The learned judge distinguishes the case from *Stewart* v. *Isador, supra*, in which case the decision turned upon the point that the cred-

itor proved his claim in the Bankrupt Court, and *failed to disclose the fact that it was secured*, which would work a fraud on the other creditors if he was allowed to receive a dividend on his entire claim, and still retain his security.

In the case before us, the stipulation of the parties is, that the plaintiff's claim "was proven up in Bankruptcy Court as a general claim." There is no evidence that he *released his lien* to the assignee, or that he failed to disclose the fact that he held any security for the claim.

Under this state of the evidence, we are of opinion that plaintiff's lien was not waived. If he disclosed his lien but made no release of it to the assignee, his claim could not be received by the Register in bankruptcy, and must be treated as rejected by him; and in the absence of evidence we will not presume that the plaintiff fraudulently concealed the fact of his lien when proving his claim before the Register.

The judgment of the court below, adjudging to the plaintiff the proceeds of the land attached, will be reversed.

As to the judgment against the garnishees, it is affirmed.

UNITED STATES SUPREME COURT.

Where the bankrupt appears after due notice, and makes no objection to the jurisdiction of the court, every presumption is in favor of the validity of the adjudication in a collateral action.

Whether the president of a corporation is duly authorized to file a petition on its behalf to file a petition, is a question of fact to be determined by the District Court.

A decree adjudging a corporation bankrupt is in the nature of a decree *in rem* as respects the status of the corporation, and if the court rendering it has jurisdiction, can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given.

Only such portions of the Bankrupt Law as are expressly or impliedly adopted by the section relating to corporations are applicable to them.

A creditor of a corporation who has proved his claim and received a dividend thereon, may prosecute an action against the corporation to recover the balance.

THE NEW LAMP CHIMNEY COMPANY v. *THE ANSONIA BRASS AND COPPER COMPANY.*

ERROR to the Supreme Court of the State of New York.

CLIFFORD, J.—Corporations, whether moneyed, business, or commercial, and joint-stock companies, are subject to the provisions of the Bankrupt Act, and the 37th Section of the act provides to the effect that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of the same, made and presented in the manner provided in respect to other debtors, the like proceedings shall be had and taken as are required in other cases of voluntary or involuntary bankruptcy; but the same section provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. (14 Stat. at Large, 535.)

Nine overdue promissory notes executed by the corporation defendants were held by the corporation plaintiffs, amounting to the sum of five thousand two hundred and sixty-six dollars and ninety-four cents, and they instituted

the present suit in the Supreme Court of the State to recover the amount.

Service being made, the defendants appeared and set up as a defense in their answer that they, the defendants, had on their own application been declared bankrupt, and that the plaintiffs had proved the claim in suit in the bankrupt proceedings and had been paid a dividend on the same, and that they were thereby prevented under the Bankrupt Act from recovering the claim, or any part of the same, in a subsequent action.

Issue being joined, the parties went to trial, and the bankrupt proceedings having been introduced in evidence, the defendants moved the court to dismiss the suit, insisting that the plaintiffs having proved the claim in the bankrupt proceedings and received a dividend on the same, had waived the cause of action; but the presiding justice denied the motion, and directed the jury to render a verdict in favor of the plaintiffs for the balance due on the notes. Exceptions were duly filed by the defendants, and they appealed to the General Term, where the judgment was affirmed, the court holding that the Bankrupt Court had no jurisdiction to adjudge the defendant corporation bankrupt, and that the proceedings in bankruptcy were void. (*Brass and Copper Co.* v. *Lamp Chimney Co.*, 10 N. B. R., 355; 64 Barb., 435.)

Still dissatisfied, the defendants appealed to the Court of Appeals of the State, where the parties were again fully heard, and the Court of Appeals affirmed the judgment rendered by the court sitting in General Term, holding that the decree of the Bankrupt Court adjudging the defendant corporation bankrupt, and the subsequent proceedings in pursuance of the same, did not have the effect to discharge the corporation from the claim in suit, beyond the amount paid to the plaintiffs as dividends, even though the claim was proved by the plaintiffs in the bankrupt proceedings. (*Same* v. *Same*, 53 N. Y., 123.)

Sufficient appears to show that the defendants are a manufacturing corporation organized under the law of the

State, which authorizes three persons to form such a corporation, and requires that the trustees shall be stockholders of the company. (Sess. Laws (1848), Chap. 40, p. 54.)

Nothing being alleged to the contrary, it must be assumed that the corporation was duly organized; and it appears that a meeting of the trustees was duly called, and notified to inquire into the condition of the affairs of the corporation, and that the meeting was regularly held; and it having been ascertained to the satisfaction of the meeting that the corporation was insolvent, it was voted and resolved, by a majority of the trustees present, that the president of the company be required to file a petition in the District Court that the corporation may be adjudged bankrupt. Such a petition was accordingly filed, and if the president of the company was duly authorized to sign and file it, the plaintiffs do not deny that the bankrupt proceedings were regular.

Two objections are taken to the jurisdiction of the Bankrupt Court, which in point of fact involve the same considerations. They are, that the majority of the stockholders did not sign the petition filed in the District Court, and that the president of the corporation was not authorized to sign it—which is a mere inference from the fact that the meeting, when the vote and resolution were adopted, was a regular meeting of the trustees; but inasmuch as the statute of the State requires that the trustees shall be stockholders, and no objection is made to the organization of the company, it may well be presumed that the trustees were stockholders, as required by law.

As before remarked, three persons may form such a corporation, and the record shows that a majority of the trustees present adopted the vote and resolution, which necessarily implies that a minority did not concur; and if not, then certainly there must have been three or more present, and the record does not show that the whole capital stock of the company is not owned by three persons.

Viewed in the light of these suggestions, it follows that the want of jurisdiction in the Bankrupt Court is not clearly

shown, and that the case is plainly one where every presumption should be that the action of the court was rightful.

Due notice, it is conceded, was given to all concerned, and that the defendants appeared in the Bankrupt Court, and that they never made any objection to the jurisdiction of the court; and in view of those circumstances, the rule is that every presumption is in favor of the legal character of the proceedings. (*Voorhees* v. *Bank*, 10 Pet., 449, 473.)

Concede that, still it is said that courts created by statute cannot have jurisdiction beyond what the statute confers, which is true; but no such question arises in the case before the court, as all concede that the District Court had jurisdiction of the subject-matter, and that the defendants appeared and claimed and exercised every right which the Bankrupt Act confers. They are, therefore, estopped to deny the jurisdiction of the court, nor are the plaintiffs in any better condition, unless it appears that the bankrupt proceedings are actually void. Void proceedings of course bind no one, not estopped to set up the objection, and in order to establish the theory that the proceedings in this case are void, the plaintiffs deny that the president of the corporation was authorized to make and file the petition in the District Court. (*McCormick* v. *Pickering*, 4 N. Y., 276, 279.)

Such a petition might properly be made by the president of the company, and be by him presented to the District Court, if he was thereto duly authorized at a legal meeting called for the purpose by a vote of a majority of the corporators; and whether he was so authorized or not was a question of fact to be determined by the District Court to which the petition was presented; and the rule in such cases is that if there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that

purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but in the other the court only errs in judgment upon a question properly before the court for adjudication, and of course the order or decree of the court is only voidable. (*Staples* v. *Fairchild*, 3 N. Y., 41, 46; *Miller* v. *Brinkerhoff*, 4 Denio, 118; *Voorhees* v. *Bank*, 10 Pet., 449, 473; *Kinnear* v. *Kinnear*, 45 N. Y., 535.)

Jurisdiction is certainly conferred upon the District Court in such a case, if the petition presented sets forth the required facts expressly or by necessary implication, and the court upon proof of service thereof finds the facts set forth in the petition to be true; and it is equally certain that the District Court has jurisdiction of "all acts, matters, and things" to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the bankrupt proceedings. (14 Stat. at L., 518.)

Power, it is true, is vested in the Circuit Courts in certain cases to revise the doings of the District Courts, and in certain other cases an appeal is allowed from the District Court to the Circuit Court, but it is a sufficient answer to every suggestion of that sort that no attempt was made in the case to seek a revision of the decree in any other tribunal. Nothing of the kind is suggested, nor can it be, as the record shows a regular decree unreversed and in full force.

Grant that, and still the proposition is submitted that the decree was rendered without jurisdiction, for the reason assigned, and that that question is open to the defendants, even though the decree was introduced as collateral evidence in a suit at law or in equity in another jurisdiction. But the court here is entirely of a different opinion, as the District Courts are created by an Act of Congress, which confers and defines their jurisdiction, from which it follows that their decrees, rendered in pursuance of the power conferred, are entitled in every other court to the same force and effect as the judgment or decrees of any domestic tribunal, so long as they

remain unreversed and are not annulled. (*Shawhan* v. *Wherritt*, 7 How., 627, 643; *Huff* v. *Hutchinson*, 14 How., 586, 588; *Parker* v. *Danforth*, 16 Mass., 299; *Pecks* v. *Barnum*, 24 Vt., 76; 2 Smith's Lead. Cas. (7th ed.), 814.)

Judgments or decrees rendered in the District Courts may be impeached for the purpose of showing that the particular judgment or decree was procured for the purpose of avoiding the effect and due operation of the Bankrupt Act, and competent evidence is admissible for that intent and purpose; but the judgment or decree of the District Court, in a case like the present, is no more liable to collateral impeachment, except to show that it was designed to prevent the equal distribution of the debtor's estate, than it is to such impeachment in the court where it was rendered. (*Palmer* v. *Preston*, 45 Vt., 154, 159; *Miller* v. *United States*, 11 Wall., 268, 300.)

Authority to establish uniform laws upon the subject of bankruptcy is conferred upon Congress, and Congress having made such provision in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States. By the Act of Congress, the jurisdiction to adjudge such insolvent corporations as are described in the 37th Section of the act, to be bankrupts, is vested in the District Courts; and it follows that such a decree is entitled to the same verity, and is no more liable to be impeached collaterally than the decree of any other court possessing general jurisdiction; which of itself shows that the case before the court is controlled by the general rule that where it appears that the court had jurisdiction of the subject-matter, and that process was duly served or an appearance duly entered, the judgment or decree is conclusive, and is not open to any inquiry upon the merits. (2 Smith's Lead. Cas. (7th ed.), 622; Freeman on J. (2d ed.), Section 606; *Hampton* v. *McConnel*, 3 Wheat., 234; *Gelston* v. *Hoyt*, 3 Wheat., 246, 312; *Slocum* v. *Mayberry*, 2 Wheat., 1, 10; *Nations* v. *Johnson*, 24 How., 195, 203; *D'Arcy* v. *Ketcham*, 11 *Id.*, 165; *Webster* v. *Ried*, *Ib.*, 437, 460.)

Such a decree adjudging a corporation bankrupt is in the

nature of a decree *in rem*, as respects the *status* of the corporation, and if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. (*Way* v. *How*, 4 N. B. R., 677; 108 Mass., 502; *Ex parte* Wieland, L. R., 5 Ch. Ap., 486; *Ocean Bank* v. *Olcott*, 46 N. Y., 12, 15; *Revell* v. *Blake*, L. R., 7 C. P., 305, 308.)

Second. Suppose that is so, then it is insisted by the defendants that the case before the court is controlled by the 21st Section of the Bankrupt Act, which, among other things, provides that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, etc. (14 Stats. at L., 526.)

Debtors, other than corporations and joint-stock companies, are certainly within that provision, and if corporations are also within it, then it follows that the judgment must be reversed, as the plaintiffs are not entitled to recover. Instead of that, the plaintiffs deny that corporations or joint-stock companies are within that provision, and insist that the case before the court is controlled by the 37th Section of the Bankrupt Act, which provides that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof—which is the view of the case taken by the Court of Appeals of the State, whose judgment is brought into review by the present writ of error. (14 Stats. at L., 535; *Brass and Copper Co.* v. *Lamp Chimney Co.*, 53 N. Y., 123.)

Difficulties, perhaps insurmountable, would attend the theory of the plaintiffs if the 21st Section of the Bankrupt Act stood alone; but it does not stand alone, and being a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same feature of the general system, so that each and every section of the act may, if possible, have their

due and conjoint effect without repugnancy or inconsistency.

Statutes must be interpreted according to the intent and meaning of the Legislature, and that intention must, if practicable, be collected from the words of the act itself, or if the language is ambiguous, it may be collected from other acts *in pari materia*, in connection with the words, and sometimes from the cause or necessity of the statute; but where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the Legislature in the words of the act itself, and they are not at liberty to suppose that the Legislature intended anything different from what their language imports. (Potter's Dwarris, 146.)

Words and phrases are often found, in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent and sometimes repugnant; when, by a reasonable interpretation, as by qualifying both or by restricting one and giving to the other a liberal construction, all become harmonious, and the whole difficulty disappears; and in such a case the rule is that repugnancy should, if practicable, be avoided, and that if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the law-maker.

Section 21, if taken literally, would require that the whole claim of every creditor proving his claim, who is included within its operation, should be forever discharged; but the 33d Section of the act provides that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged under the Bankrupt Act. Such debts may be proved, and the provision is that the dividend shall be a payment on account of the debt; but it is incorrect to suppose that the creditor by proving such a debt waives "all

right of action and suit against the bankrupt." On the contrary, it is well settled that no consequences can be allowed to flow from proving a debt which are inconsistent with the provisions of Section 33. (*Ex parte* Robinson, 2 N. B. R., 342; 6 Blatch., 253; *In re* Rosenberg, 2 N. B. R., 236.)

Where the bankrupt has in all things conformed to his duty under the Bankrupt Act, he is entitled to receive a discharge, and the 34th Section provides that a discharge duly granted shall, with the exceptions specified in the preceding section, release the bankrupt from all debts, claims, liabilities, and demands, which were or might have been proved against his estate in bankruptcy.

Debts due to the United States are not enumerated in the exceptions contained in Section 33, but all admit that such debts may be proved in the bankruptcy proceedings; and yet it is settled law that the certificate of discharge does not release any debt which the bankrupt owes to the United States. (*United States* v. *Herron*, 9 N. B. R., 535; 20 Wall., 251.)

Other examples of the kind might be referred to, where it has become necessary to qualify, restrict, or limit certain provisions of the Bankrupt Act in order to reconcile seeming incongruities and inconsistencies, but those mentioned will be sufficient for the present investigation.

Beyond all question, corporations of the kind and joint-stock companies are brought within the provisions of the Bankrupt Act by the 37th Section, and the whole administrative proceedings in respect to such bankrupt corporations and joint-stock companies are specifically regulated by that section as a separate feature of the bankruptcy system. Much of the system applicable to such corporations and companies, it is true, is borrowed by general phrases from the other sections of the same act, but only such portions of the same as are expressly or impliedly adopted by that section are applicable to such corporations and companies, as clearly appears from the distinct features of the regulations prescribed, which are as follows:

First. That the officer signing the petition for voluntary

bankruptcy must be duly authorized by a vote of the majority of the corporators at a legal meeting called for the purpose. Second. That the petition for involuntary bankruptcy may be made and presented by any creditor or creditors in the manner provided in respect to debtors, without any specification as to the number of the creditors or the amount of their debts. Third. That the like proceedings shall be had and taken as provided in the case of debtors. Fourth. That all the provisions in the act which apply to the debtor or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examination, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner and with like force effect, and penalties apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof. Fifth. That all payments, conveyances, and assignments declared fraudulent and void by the act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Sixth. That no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person or officer or member thereof. Seventh. That all the property and assets of any corporation declared bankrupt by proceedings under the Bankrupt Act shall be distributed to the creditors of the corporation in the manner therein provided in respect to natural persons. (14 Stat. at L., 535.)

Special regulations in respect to petitions are enacted by Section 37 of the Bankrupt Act, where the insolvent is a corporation or joint-stock company, different from those prescribed in cases where the insolvent party is a natural person or partnership. But, subject to the exception that no allowance or discharge shall be granted to any such corporation or joint-stock company, all of the administrative proceedings are to be the same as in case of bankrupt individuals,

not because corporations are within the words of the other provisions of the Bankrupt Act, but because the 37th Section of the act provides that the provisions of the act shall apply to such corporations and joint-stock companies, and it appears that all the administrative proceedings, with that exception, are required to be in conformity to the regulations prescribed in respect to individual bankrupt debtors.

By the terms of the section, corporations adjudged bankrupt are also made subject to the same duties as individual bankrupt debtors in regard to all the matters therein specified, but the emphatic exception to all those general regulations is that no allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, officer, or member thereof.

Examined in the light of these suggestions, it is as clear as anything dependent upon the construction of a statute well can be, that Congress, in giving jurisdiction to the District Courts to adjudge moneyed, business, and commercial corporations and joint-stock companies bankrupt, never intended to adopt the introductory paragraph of Section 21 or Section 32 as applicable to such corporations or companies. Neither corporations of the kind nor joint-stock companies are within the words of either of those sections, and it is equally clear that nothing is contained in Section 37 to support such a conclusion, from which it follows that the claim of the plaintiffs, beyond the amount received as dividends, is not discharged by the proceedings in bankruptcy.

Good and sufficient reasons may be given for granting a discharge from prior indebtedness to individual bankrupts, which do not exist in the case of corporations, and equally good and sufficient reasons may be given for withholding such a discharge from corporations, which do not in any sense apply to individual bankrupts. Certificates of discharge are granted to the individual bankrupt "to free his faculties from the clog of his indebtedness," and to encourage him to start again in the business pursuits of life with fresh hope and energy, unfettered with past misfortunes or with

the consequences of antecedent improvidence, mismanagement, or rashness.

Many corporations, it is known, are formed under laws which affix to the several stockholders an individual liability, to a greater or less extent, for the debts of the corporation, which, in case certain steps are taken by the creditors, become in the end the debts of the stockholders. Such a liability does not in most cases attach to the stockholder until the corporation fails to fulfill its contract, nor in some cases until judgment is recovered against the corporation, and execution issued and return made of *nulla bona*. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder's individual liability.

Consequences such as these were never contemplated by Congress, and the fact that they would flow from the theory of the defendants, if adopted, goes very far to show that the theory itself is unfounded and unsound. Instances of such individual liability are not rare, and it appears that the law under which the defendants were organized, makes the several stockholders individually liable to the creditors of the company, in an amount equal to the amount of their stock, for all debts and contracts of the company, until the whole amount of the capital stock is subscribed and paid. (Sess. Laws of N. Y., 1848, p. 56, Section 10.)

Bankrupts, other than corporations or joint-stock companies, if they have conformed in all things to their duty under the Bankrupt Act, are entitled to receive a certificate of discharge; and the provision is that such certificate shall operate to discharge such a bankrupt from all debts and claims which by said act are made provable against his estate, subject, of course, to the exceptions described in the 33d Section of the same act. (*Bennett* v. *Goldthwait*, 109 Mass., 494; *Wilson* v. *Capuro*, 4 N. B. R., 714; 41 Cal., 545; *In re* Wright, 2 N. B. R., 142; 36 How. Pr., 167.)

Since this litigation was commenced, Congress has amend-

ed the 21st Section of the Bankrupt Act, and provided that where a discharge has been refused or the proceedings have been determined without a discharge, a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt. (18 Stats. at L., 179.)

Comment upon that provision is unnecessary, as it clearly appears that the unamended act did not discharge the claim of the plaintiffs.

Judgment affirmed.

UNITED STATES DISTRICT COURT—N. D. NORTH CAROLINA.

A bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy.

In re NICHOLAS MARTIN.

DICK, J.—Upon the question of law certified by the Register of this court, I have had the benefit of well-considered arguments, and the counsel for the bankrupt have filed an elaborate brief referring to all the authorities to be found on the subject.

No express decision upon the question in controversy has been cited, and we are left to determine the matter upon the "reason of the thing"—to be ascertained by a consideration of the spirit and policy of the Bankrupt Laws.

Under the Constitution, Congress has a paramount power to establish Bankrupt Laws, with a single restriction—that all such laws must be uniform in their operation in all the States. The present Bankrupt Laws are highly remedial statutes, and are entitled to a liberal construction in effecting the purposes they were intended to accomplish. The general purpose and policy of these laws are to administer the estates of bankrupts in such a manner as to adjust, determine, and secure the rights of the various creditors who prove their

debts; and they also afford reasonable benefits to the bankrupts who comply with their provisions.

These laws protect the rights of creditors:—

First. By requiring an honest surrender of property on the part of the bankrupts, and by making suitable provisions to guard against fraud and dishonest practices.

Second. By adjusting the rights of unsecured creditors upon the principle that equality is equity. They, however, fully recognize and enforce all liens and priorities acquired by other creditors, which are not in conflict with the spirit and purposes of the general system of bankruptcy.

The benefits conferred upon a bankrupt who makes a fair surrender of all his property, and who in all respects acts honestly, are:

First. The means of a reasonable, immediate, and temporary support for himself and family against all liens created by operation of law.

Second. A full discharge from all debts provable in bankruptcy.

The means of support thus allowed are expressly specified in the law, and consist of:

First. The bounties directly conferred by Congress in the first clause of the 14th Section of the original Bankrupt Act. (Rev. Stat., Section 5045.)

Second. Exemptions allowed by the statutes of the State in which the bankrupt has his domicil, and which were in force in the year 1871.

Even a strict construction of those clauses of the law which confer the bounties of Congress, would allow the bankrupt the specified exemptions of household furniture and other property for the support of himself and family, against all liens which he had not created by a direct act encumbering the property claimed by him. Congress has plenary power upon this subject, if its laws are everywhere uniform in their operation. The clauses of the law which we are considering are certainly uniform in their operation, and may be regarded as fundamental and essential principles in the

system of bankruptcy so wisely established. Any system of bankruptcy would operate injuriously and cruelly, that would deprive an honest and unfortunate debtor of all his property —even the necessaries of life—and leave him and his family to starve, or live upon the mercy or charity of the public. Such cannot be the spirit and purpose of a system of bankruptcy established by a Congress possessing paramount and plenary power over the subject, and representing an enlightened, patriotic, and Christian people.

In our case, the exemptions allowed by the State laws were set apart by the sheriff before he levied the executions in his hands. Under the State laws, the levy would have been unlawful, if the sheriff had not previously set apart such exemptions. This matter is not in controversy, and I refer to it only for the purpose of sustaining my views upon the question presented for determination.

If the exemptions provided for by the laws of a State—which can exercise only very limited power over the subject —are set apart and allowed, how is it possible that the rights of a bankrupt, secured by the law of a Congress of plenary power, can be defeated.

The question decided in this court (*In re* Shipman) carrying out the principles adjudged *In re* Dillard, 9 N. B. R., 8, and *In re* Deckert, 10 N. B. R., 1, does not apply to the case before the court, as in that case it was only decided that State exemptions are not allowed against debts contracted before the adoption of our State Constitution.

I deem it unnecessary to further discuss the question certified by the Register. I am of the opinion that the bankrupt was entitled to the exemptions which he claimed, and direct an order to be drawn requiring the sheriff to pay over to the clerk of this court, for the benefit of the bankrupt, the money derived from the sale of the property, which he holds under a former order of this court.

UNITED STATES CIRCUIT COURT—MINNESOTA.

Under the statutes (Rev. Stats., Sections 5132, 5440), other persons than the bankrupt can *conspire* with the latter to commit the acts made criminal, under the seventh and tenth subdivisions, Section 5132, of the Revised Statutes.

It seems that under criminal section of the Bankrupt Act (Rev. Stats., Section 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted, though not expressly referred to in the statute.

UNITED STATES v. *JOHN BAYER et al.*

THE defendants are indicted for a conspiracy to commit offenses against the United States in violation of the penal section of the Bankrupt Act. (Rev. Stat., Sections 5132, 5440.) The indictment contains two counts. The first count, based upon Section 5132, subdivision ten, and Section 5440, after alleging the adjudication of the bankruptcy of one John Bayer by the District Court for the District of Minnesota, June 2, 1875, and after setting forth the facts, showing the jurisdiction of that court in said matter of bankruptcy, proceeds to charge that the said John Bayer, and the defendants, Kargleder and Ober, within three months next before the bankruptcy proceedings aforesaid were commenced, to wit: on June 1, 1874, in said district, amongst themselves unlawfully and fraudulently conspired, confederated, and agreed together to commit a certain offense against the United States, to wit: by the execution and delivery, then and there, by said John Bayer of a certain instrument in writing signed by him, wrongfully and unlawfully, and with intent to defraud the creditors of said John Bayer, to mortgage, sell, and dispose of (while they still remained unpaid for, as in the indictment alleged) to said John Kargleder, otherwise than by *bona fide* transactions in the ordinary way of the trade of said Bayer, certain goods and chattels of said Bayer which had been obtained on credit, etc. It is then alleged that said Bayer and said Kargleder thereupon performed certain specified acts in order to effect the object of said conspiracy.

The second count, based upon Section 5132, subdivision seven, and upon Section 5440, after repeating the preliminary averments of the first count, further alleges the appointment of an assignee in bankruptcy of said Bayer's estate, and the proof in bankruptcy by said Kargleder of a false and fictitious debt against said Bayer's estate, and the said Bayer's and Ober's knowledge of the premises; and further charges the said Bayer, Kargleder, and Ober did *then* unlawfully conspire and confederate together to commit an offense against the United States, to wit: did conspire and confederate together, that Bayer, knowing as aforesaid that Kargleder had proved a false and fictitious debt against his estate, should then and there and continually, for more than one month thereafter, fraudulently and unlawfully, wholly fail, refuse, and neglect to disclose the same to his said assignee in bankruptcy. It is then averred that in order to effect the object of said conspiracy, said Kargleder and Ober then and there falsely asserted and claimed, in the presence of said assignee, that said debt, so proven by said Kargleder, was a true, just, and valid claim against Bayer for money loaned to him by Kargleder; and that in further pursuance of the conspiracy, the bankrupt Bayer then, and for two weeks thereafter, fraudulently failed, neglected, and refused to disclose said fictitious debt to his said assignee in bankruptcy.

The defendants, Kargleder and Ober, move to quash the indictment, because no person except a person respecting whom proceedings in bankruptcy are commenced, can commit the offense; because the defendants cannot conspire to commit an offense which they cannot, in law, commit, and because a *nolle prosequi* has been entered as to Bayer, the bankrupt.

Morris Lamprey and *Reuben E. Benton*, for the motion.

W. W. Billson, District Attorney, opposed.

DILLON, J.—The questions presented are important, and so far as the court is advised, are new. The leading objection made by the counsel for the defendants, is that no per-

son can be punished under the penal section of the Bankrupt Act (Rev. Stats., Section 5132), except *the* "person respecting whom proceedings in bankruptcy are commenced;" that this section does not extend to those who counsel, aid, and assist in the commission of the acts which that section makes criminal when committed by "*the* person respecting whom bankruptcy proceedings" are pending, and as a corollary, it is urged that if a person cannot himself commit a specified offense, he is necessarily incapable of conspiring with another or others to commit it.

This indictment is for *conspiracy*, and is based upon Section 5440 of the Revised Statutes, which provides that "if two or more persons conspire to commit any offense against the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc. The offense which it is alleged the defendants conspired to commit are acts made penal by the *seventh* and *tenth* subdivisions of Section 5132 of the Revised Statutes.

It is not necessary to decide the main proposition relied on by the learned counsel for the defendants, which is that under Section 5132 *no person*, except the one respecting whom proceedings in bankruptcy are commenced, can commit, or be punished for, the acts therein made criminal. Without intending to determine the soundness of this position, I must say that the result of the argument left my mind with a decided impression against it. It is true that the statute only mentions the debtor or bankrupt; but it is a statutory misdemeanor only that is created, and the general principle of the law is, that all procurers and abettors of statutory offenses are punishable under the statute, although not expressly referred to in the statute. (Bishop on Statutory Crimes, 136; *Comw.* v. *Gannet*, 83 Mass., 7; *United States* v. *Harbison*, 13 Int. Rev. Rec., 118 (Judge Emmons), and cases cited *infra*.) Moreover, it has been several times adjudged, upon full consideration, that it is immaterial that the aider

and procurer is himself disqualified to be the principal actor in the offense, by reason of not being of a particular age, sex, condition, or class. (*State* v. *Sprague*, 4 R. I., 257; *Boggus* v. *State*, 34 Geo., 275; *Rex* v. *Potts*, Russ. and Ry. C. Cas., 353; 1 Bish. Cr. Law, 627, 629.)

But if it be true that none but the bankrupt can be indicted under Section 5132, still it is clear that other persons can combine and confederate with him to commit the acts therein made offenses against the United States. By Section 5440, conspiracies to commit any offense against the United States are made punishable, provided some act is done to effect the object of the conspiracy. The statute is based upon the common-law principle that *conspiring* to commit a crime is itself criminal; and the fact that one of the conspirators could not himself commit the intended offense, neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it.

The legal as well as moral guilt of all the conspirators is the same. One of the offenses which it is alleged the conspiracy was entered into to commit, was, the defendants knowing that a false and fictitious debt against the estate of the bankrupt had been proved, they conspired together that the bankrupt should fail to disclose the same to the assignee; the other was in respect to a fraudulent disposition of the property of the person in bankruptcy to one of the alleged conspirators. Now, it is necessary to both of these offenses that another person besides the bankrupt should have been guilty of a violation of law; and if the bankrupt and such other person conspire together to commit the acts made criminal by the Bankrupt Law, and either does any act in pursuance of such conspiracy to effect its object, why should they not be punishable, although the relation of the parties to the criminal act is such that only one of them can commit the act itself? (Bishop on Crim. Law, Section 432.)

The conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been completed is no *legal* bar to a prosecution for the con-

spiracy. (*United States* v. *Boyden*, 1 Lowell, 266, 269, and cases cited; *Regina* v. *Boulton*, 12 Cox C. C., 87; *Regina* v. *Rowland*, 5 *Ib.*, 436, 485, 487; *United States* v. *Rindskopf*, 21 Int. Rev. Rec., 326, 327.)

The motion to quash the indictment is denied.

Motion overruled.

SUPREME COURT—NEW HAMPSHIRE.

If property taken under an attachment issued more than four months before the commencement of the proceedings in bankruptcy is delivered to a receiptor, the plaintiff is entitled to take a judgment *in rem* and levy the execution upon the money which may be collected from the receiptor.

CALEB M. BATCHELDER v. *JACOB D. PUTNAM.*

HIBBARD, J.—Personal property was attached upon the plaintiff's writ. The defendant procured a receiptor, and the property went again into his hands. The officer was not only justified in delivering it to a responsible receiptor, but he was bound to accept one if offered. The defendant having been adjudged a bankrupt, the plaintiff is not entitled to judgment *in personam*. But, the proceedings in bankruptcy having been commenced more than four months after the attachment, he is entitled to judgment *in rem* for the amount of his claim, unless here is an exception to the uniform practice in similar cases. The only reason assigned for making an exception against this plaintiff is, that the property attached, receipted for, and returned to the defendant, has been sold by him. It may be assumed that the purchaser took the property without any such notice of the attachment as to preclude him from holding it. The attachment is, therefore, dissolved, so far as the interests of the purchaser may be affected by it. The officer can no longer levy on the identical property attached; but if the defendant were not in bankruptcy, the security of the plaintiff would be good for

its value in the hands of the receiptor, who would be estopped from setting up, as a defense to his liability upon the receipt, a dissolution of the attachment occasioned by his own neglect to keep the property according to his engagement. No difficulty would arise, though the attachment on the property were dissolved as between the officer and the purchaser, in levying on its value when collected of the receiptor. The doctrine that, because property attached has been sold by the debtor, and the attachment dissolved, therefore the receiptor has ceased to be liable, is suggested only upon the ground that this result is effected by the bankruptcy of the defendant. But how can that circumstance affect the question? In *Towle* v. *Robinson*, 15 N. H., 409, and in *Lamprey* v. *Leavitt*, 20 N. H., 544, it was expressly decided that the receiptor remains liable in such a case. It is claimed by counsel that these are not authorities in the present case, because the judgments in these cases do not appear to have been *in rem;* but they must have been, unless judgments were negligently allowed to be taken *in personam.* In the case last cited, it is stated in the head-note that execution was "awarded against the property attached," from which it appears that the judgment was *in rem.* If the property attached in the present case had been retained in the hands of the officer, the security of the plaintiff would be wholly unaffected by the bankruptcy proceedings. (*Kittredge* v. *Warren*, 14 N. H., 509.) And it certainly would be extraordinary if his security, being fully preserved until the bankruptcy proceedings by the delivery of the property to a receiptor according to law, should be suddenly lost the moment those proceedings are commenced, though more than four months after the attachment. We perceive no difficulty in rendering judgment *in rem*, and levying the execution issued upon the money which may be collected of the receiptor. If the receipt is in common form, and the officer lawfully demands the property, the receiptor must deliver it to him free from intervening rights, or become liable. If the property has been sold, it could not avail the receiptor to exhibit it

to the officer, subject to a title in a third person, acquired since the receipt was given. It must, when delivered, be subject to a levy in the same manner as when he received it, or the receiptor will not be exonerated. We do not see that this is anything but the ordinary case of an attachment lost by the property, after it is receipted for, being sold or used up by the debtor. It would appear that the precise contingency that the receipt was taken to secure against has happened. In other words, the property attached has gone where it is beyond the power of the officer to levy upon it. What could be the object of taking a receipt for property attached, unless it was to be good if the property should be sold or used up before judgment? Whether, in the meantime, the defendant has or has not become a bankrupt, unless the bankruptcy were in season to vacate the attachment, must be wholly immaterial. In *Carpenter* v. *Turrell*, 100 Mass., 450, where an attachment was dissolved by the giving of a bond to pay the judgment which should be recovered, it was held that the plaintiffs were not entitled to have a special judgment entered to enable them to avail themselves of the bond. But that decision was based on the peculiar terms of the bond, and it may be inferred from the opinion of the court that a contrary result would have been reached if the property attached had gone into the hands of a receiptor. Undoubtedly this would have been so, because it was expressly held, in an earlier decision of the same court, which has never been overruled or questioned, in an action in favor of a deputy-sheriff against a receiptor of property attached, that when necessary a plaintiff in such a case may have a special judgment and execution to enable him to avail himself of his attachment. (*Ives* v. *Sturgis*, 12 Met., 462.) We are of the opinion that in this State, where a creditor of a bankrupt has acquired a vested right in his security by the lapse of time after an attachment, he is entitled to a special judgment against the property, or the avails of it, or its substitute or equivalent, whether the identical property remains in the hands of the officer, or it has been sold

by consent, under Section 19, Ch. 205, Gen. Stats.; or upon the certificate of examiners, under Section 22; or restored to the debtor upon his giving bond, under Section 25; or taken from the officer by a writ of replevin, under Section 26; or given up upon a bond in review, under the 48th Rule of court. (See *Zollar* v. *Janvrin*, 49 N. H., 114.)

The plaintiff must, therefore, be permitted to take judgment *in rem* for such sum as he might lawfully recover against the defendant, if there were no bankruptcy proceedings.

Case discharged.

SUPREME COURT—IOWA.

A proceeding to foreclose a mortgage instituted in a State court after the commencement of the proceedings in bankruptcy, without making the assignee of the mortgagor a party thereto, is valid as against all persons who are parties thereto.

If the assignee does not seek to redeem mortgaged property, the mortgagee may proceed in a State court to foreclose the mortgage, and such a proceeding is not absolutely void.

BROWN v. *GIBBONS.*

BECK, J.—The plaintiff declares, in the usual form, upon two promissory notes signed by defendant and J. O. Humble, and payable to Alexander Barclay & Co. The notes were transferred by indorsement to the firm of which plaintiff is the surviving partner. The defendant, in his answer, sets up the following matter as an equitable defense to the action.

The copartnership of which plaintiff is the survivor was engaged in a banking business, and was the successor of the payees of the notes in suit, who were also bankers, Barclay being a member of each firm. The defendant signed the notes as security of Humble, a fact at the time known to the payees. Prior to the execution of the paper, Humble had executed two mortgages, one upon the east half of lot 12,

block 106, in the City of Keokuk, and certain machinery and personal property, and upon another lot; the other upon buildings and machinery, situated upon still another lot, to secure indebtedness then existing and advances contemplated and afterward to be made. The notes in question were given for money advanced under these mortgages, and were secured thereby. In May, 1870, plaintiff instituted an action in the District Court of Lee County to foreclose the mortgages, and a decree was rendered therein at the September term following, against Humble and other parties made defendants. The amount due upon and covered by the notes in suit was included in the decree. Prior to the commencement of the foreclosure suit, Humble had gone into bankruptcy, and, under the provisions of the law, all his property had been transferred and become vested in his assignee, William Vencill. Vencill was not made a defendant in the foreclosure proceedings. The property covered by the mortgages was sold upon the decree, and the real property was purchased by the firm of which plaintiff is the survivor, and possession thereof was taken under the sale. After the death of Barclay, Vencill, Humble's assignee in bankruptcy, for a sufficient consideration, conveyed the real estate to plaintiff, who subsequently sold and conveyed it to Bruce for the sum of three thousand dollars. The avails of the property realized under the foreclosure sale was not sufficient to satisfy Humble's indebtedness secured by the mortgages; but it is alleged that the value of the property and the sum for which it was sold to Bruce are equal to such indebtedness.

The defendant, in his answer, claims that the foreclosure proceedings having been prosecuted in the State court, and Vencill, the assignee, not having been made a party therein, are void; and that plaintiff cannot claim that he acquired any right to the property thereunder. But that, having acquired the property by proceeding not recognized by the law, and appropriated it to his own use, he must be held to account for its true value as payment upon the notes in suit, on which defendant is bound as security.

The defendant prays that the plaintiff be required to account for the value and profits of all the property he, or the firm of which he is the survivor, received under the mortgage and foreclosure suit; that he be credited with the amount paid for taxes, incumbrances, and other proper charges; and the difference be applied upon the notes in suit. A demurrer interposed by the plaintiff to this answer was sustained so far, that the court held that the foreclosure proceedings against Humble are not subject to the attack made in the answer, and are valid so far as to protect the right of plaintiff to the property acquired thereunder. But it was held that the notes in suit should be credited with such part of the sum realized in the foreclosure action, in the proportion which the amount of the notes bears to whole debt secured. We are required to pass upon the effect of the decree in the foreclosure action, and to inquire into the jurisdiction of the court over the subject-matter involved therein.

First. Under the provisions of the Act of Congress of March 2, 1867, establishing a uniform system of bankruptcy, the title of all the property, both real and personal, of the bankrupt, became vested in the assignee, by virtue of the conveyance executed by the Register; the conveyance relates back to the commencement of the proceedings in bankruptcy. (Section 14.) But such conveyance in no manner affects the validity of mortgages of personal and real property, made in good faith and otherwise valid. When such liens exist, the assignee is authorized to redeem the property therefrom, or sell and convey the same, subject thereto. (Section 14.) It will be perceived that the interest and title acquired by the assignee is in no wise different from those held by a *bona fide* purchaser and grantee of other property which is subject to prior incumbrances. He has no other or higher rights. He is simply the grantee of incumbered property, and his rights, as against the holder of the incumbrance, are not different from those held by the bankrupt prior to the institution of the proceedings in bankruptcy; these are, to redeem the prop-

erty or discharge it from the lien by the payment of the debts secured.

Leaving for consideration hereafter the questions involving the jurisdiction of the State court to enforce a mortgage against a mortgagor who is declared a bankrupt, we will inquire into the effect of the decree of foreclosure against the mortgagor, Humble, and the other persons made defendants to the action instituted after the title of the property had passed to the assignee in bankruptcy. Without considering what effect that decree had upon the title and rights of the assignee, and its validity as to him, and without giving it such effect or validity as to defeat his title to the property, we cannot regard it as void as to the parties made defendants in the proceeding. As to them, it was a valid proceeding; and their right of redemption under the mortgage was thereby cut off. The property, as against these parties, was subjected to the lien of the mortgage, and the assignee could not have released it therefrom except by redemption. But he conveyed his interest therein, and plaintiffs thus acquired all the interest and title of the other parties to the foreclosure action and of the assignee. Now, it cannot be denied that by means of this foreclosure, together with the purchase of the assignee's interest, the plaintiff subjected the property to his mortgage. In the absence of evidence of fraud or improper practice on his part, it must be presumed that the property was thus fairly applied to the payment of Humble's note.

Second. The question affecting the jurisdiction of the court rendering the decree over the subject-matter of the action, now demands our attention. It is insisted by defendant's counsel that, under the Bankrupt Act, exclusive jurisdiction in such cases is vested in the United States courts; and for that reason the foreclosure decree is *coram non judice*, and void. This position we will proceed to discuss and determine.

The Act of March 2, 1867, confers original jurisdiction in bankruptcy upon the several District Courts of the United States. The 1st Section, after provisions to this effect,

proceeds in the following words: "And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

As we have above seen, the bankruptcy of the debtor does not affect liens subsisting in good faith upon his property, but the assignee may, under the direction of the court, redeem therefrom. (Section 14.) The following provisions are found in Section 20: "When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein, upon receiving such excess; or he may sell the property subject to the claim of the creditor thereon; and in either case, the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

From these provisions, it appears that debts of the bankrupt secured and his property covered by mortgages, do not, by the simple operation of the law, fall within the bankruptcy proceedings. To bring them therein, the assent and act of the assignee and creditor, under the direction of the court, is necessary. The assignee may redeem with the approbation of the court. If he fails to do this, the creditor's rights remain unaffected, unless he voluntarily, under the provision of Section 20, seek the benefits of the bankruptcy, and thus becomes a party to the proceedings. Unless he do this, he must content himself with the security he holds, and is debarred of a share of the proceeds of the estate disposed of under the bankruptcy. The assignee may redeem from the lien without the creditor's consent, just as the debtor himself, or any lien holder, could have done prior to the bankruptcy. If he fails to do this, the creditor may keep himself away from the proceedings. If he do not appear, his rights are not affected, and the property he holds by his lien cannot be taken from him. If there should be no redemption by the assignee, and the creditor refuses to come with the bankruptcy proceedings, under Section 20, it is very plain that the Bankrupt Court can have nothing to do with the mortgaged property; in other words, can acquire no jurisdiction over it. If the mortgaged property is not, in the manner indicated, brought within the jurisdiction of the Bankrupt Court, the creditor is left to pursue his remedy, unaffected by the act in question, in the State courts. That we express the full force and effect of the statute in question, there is, in our minds, no doubt. And the wisdom of the provisions is clearly to be seen; for in no other manner than is herein provided, could the rights of the mortgagee be protected, and the mortgage be preserved unimpaired. It is provided in Section 21, that "no creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined." Our views, we think, are not incon-

sistent with this provision. The prohibition evidently is intended to apply to a case whereof the Bankrupt Court possesses jurisdiction. As we have seen, jurisdiction of the subject-matter of the foreclosure proceeding—the property mortgaged—is acquired by the redemption of the assignee or the assent of the creditor. When neither of these acts has been performed, the court does not acquire jurisdiction; in such a case, it cannot be said that the mortgage debt, for the purpose of foreclosure, is provable, according to the expression of the clauses of the statute just quoted.

Our conclusions are based upon the peculiar facts of this case, and will not be understood to reach beyond them. We have not considered the effect upon the decree in question, which would have resulted had the assignee been made a party to the foreclosure proceedings, or had the Bankrupt Court taken cognizance in any manner of the subject-matter of the action. The facts not being in the case, the question suggested will not arise. The foreclosure proceedings, under which plaintiff acquired the property in question, being valid, he cannot be required to account to defendant for a sum greater than the amount for which it was sold upon execution. The Circuit Court, therefore, correctly ruled in sustaining the demurrer.

Affirmed.

COURT OF APPEALS—NEW YORK.

A defendant generally has a right to set up by supplemental answer matter of defense which has occurred or come to his knowledge subsequently to the filing of his first answer.

The defendant should apply by motion for leave to file a supplemental answer, so that the opposite party may be heard, and the court may determine whether there has been inexcusable *laches* or whether any reasons appear which are recognized as giving authority for refusing the motion.

Leave to file a supplemental answer must be granted, unless the papers show a case in which the court may exercise a discretion as to granting or withholding it.

Where an attachment issued more than four months before the commence-

ment of the proceedings in bankruptcy was dissolved by filing a bond the bankrupt will not be allowed to file a supplemental answer setting up his discharge.

GEORGE E. HOLYOKE et al, Respondents, v. *SAMUEL ADAMS et al, Appellants.*

FOLGER, J.—The Code of Procedure (Section 177) provides for a supplemental answer, alleging material facts which have occurred after the former answer. The result of the decisions in the Supreme Court, and in the other courts which have passed upon the question, is that this section is a substitute for the former practice, in actions at law, of a plea *puis darrien*, and in actions in equity of a supplemental answer (*Bate* v. *Fellowes*, 4 Bosw., 638; *Hoyt* v. *Sheldon*, 4 Abb. Pr., 59; *Slauson* v. *Englehart*, 34 Barb., 198; *Brown* v. *Richardson*, 4 Robt., 603; *Garner* v. *Hannah*, 6 Duer, 262), but with this distinction, that the supplemental answer under the Code does not take the place of the original answer, but is in addition to it (34 Barb., *supra*); which, indeed, under the former practice had been held to be the case, when the plea *puis darrien* was not inconsistent with the former plea. (*Rayner* v. *Dyett*, 2 Wend., 300.) Section 469 of the Code continues in force all pre-existing rules and practice of the courts in civil actions, consistent with the Code itself. And it has been said that by the force of this section, Section 177 must be so administered as that a leave to serve a supplemental answer shall be given, in actions at law, in all cases in which a plea *puis darrien* could have been put in as a matter of right. (*Hoyt* v. *Sheldon*, *supra.*); which case was recognized in *Garner* v. *Hannah* (*supra*), with a limitation that leave must be applied for by motion at Special Term, and the supplemental answer could not be tendered at the trial court, as was the case with the plea *puis darrien*, under the former practice; while in *Bate* v. *Fellowes* (*supra*), it was thought that the Code was designed to alter the rule of the former practice, so as to leave the reception of the answer open to a larger discretion than the courts previously exercised on the same subject; but this general remark is qualified and the

discretion supposed to exist is indicated as no more than to do that upon the motion for leave to serve the supplemental answer, which a court under the former practice would have done after the filing of the plea, on a motion to strike it from the file of the court. Thus, the plea would be ordered off the files, if the defendant was chargeable with *laches* in putting it in, and his motion to be allowed to serve it *nunc pro tunc* would, in such case, be denied (*Sandford* v. *Sinclair*, 3 Denio, 269), and it would have been set aside on motion if false, or contrary to justice, or fraudulent; as is to be implied from *Jones* v. *Herbert*. (7 Taunt., 421.) Section 177, in providing for a motion for leave to make a supplemental answer, gives to the court the power and opportunity to look into the facts before the answer is served, with the same scrutiny which, under the practice more or less supplanted by the Code, was exercised after the plea had been served, on a motion then made to strike it out. And, in the exercise of this power, the court has, in one case at least, required the defendant applying for leave to supplement his answer to abandon his former answer, and to rest his defense alone upon the matter to be set up in the supplemental answer. (*Bate* v. *Fellowes, supra.*) And this though, as above stated, the authorities are to the end that, under the Code, the supplemental answer is not a substitute for the original answer, but an addition to it. So that it comes to this: that generally a defendant has a right to set up, by supplemental answer, matter of defense which has occurred or come to his knowledge subsequently to the putting in of his first answer, but that he must apply to the court, by motion, for leave so to do, so that the opposite party may be heard, and the court may determine whether there has been inexcusable *laches*, or whether any of the reasons appear, which are recognized as giving authority for denying the exercise of the general right in the particular instance. And the court must grant leave, unless the motion papers show a case in which the court may exercise a discretion as to granting or withholding leave. It is claimed that *Medbury* v. *Swan* (46 N. Y., 200)

is in conflict with this. There may be expressions there, which, if separated from the context and from the facts of the case, are susceptible of such interpretation. It is said, that "the right to allege new matter, by supplemental pleading, is not an absolute and positive right, but is made to depend upon the leave of the court in the exercise of a legal discretion." This statement alone would be in conflict with what is now said. But the next sentence in that case explains and limits that which has just been quoted, to wit: "The application may be refused if the new defense, although strictly legal, is inequitable, or if the application is not made with reasonable diligence. A party may waive his right altogether, or lose it by *laches*." What is meant in *Medbury* v. *Swan*, and, I think, what is there expressed when the case is taken altogether, is, that there is no such absolute unrestrainable right to plead by a supplemental answer matter newly arisen, as that the court may not control the exercise of the right within the limits which have been long established, by refusing leave thus to answer when long delay has intervened, or fraud is shown, or injustice will be wrought by allowing the new defense. That was a case presenting the question of *laches*. The motion there was denied below, upon the ground that *laches* existed. This court held that there was, upon the facts, a discretion to be exercised, and that an order made in the exercise of that discretion was not appealable. But that case is an authority, that the defense of a discharge from indebtedness under the Bankrupt Law of the United States may be denied, where inexcusable delay in presenting the defense has intervened, which is in accord with decisions under the old practice. (3 Denio, *supra*.) It is also an authority that where the facts of the case call for the exercise of the discretion of the Special Term, this court will not review the order made in the exercise thereof.

It is next to be seen whether, in the case in hand, the order appealed from was a discretionary order, or whether the facts of the case warranted the exercise of the discretionary power of the court. I do not think that the facts of the

case make any ground for a charge against the defendants of unwarrantable delay in seeking to interpose their new defense. The time during which delay must be sought for, to be brought against them on this motion, is that elapsing from the obtaining of their discharge until the noticing of the motion. The discharge of one of them is dated the 5th of September, 1873, and that of the other, the 6th of January, 1874. The order in this action, to show cause, was obtained on the 9th of January, 1874. Nor was this the first attempt of the defendants to avail themselves in this action of the proceedings in the Bankruptcy Courts. The proceedings in bankruptcy were begun in October, 1872, against one and by the other of the defendants, and they moved for a stay of proceedings in this action, pending the application in bankruptcy for a discharge. It thus appears that the defendants were diligent to avail themselves in this action of the bankruptcy proceedings. Nor does it appear in the case that the order denying leave was based upon an allegation of *laches*. Nor can it be claimed that the matter of defense now sought to be interposed is open to the objection that it is fraudulent. It is upon its face the action of a court, the final judgment of it, by which it has granted the defendants a discharge from their debts. No fraudulent practice is alleged to have been used in obtaining the discharge, even if such a question would be tried upon affidavits. The courts below put the denial of the order on the ground that the plaintiffs had obtained a lien by attachment upon property of the defendants, over four months before the granting of either discharge; that thus a lien had been obtained which would be unaffected by the Bankrupt Law; that the defendants having given an undertaking with sureties, that property was released from attachment; that now if this defense is permitted, no judgment is likely to go against the defendants, and the sureties in the undertaking will be relieved from the letter of their obligation, for that by its terms is not broken until a judgment is recovered by the plaintiffs; but that the undertaking of the sureties is to be held in legal contemplation to be a part of

and in continuation of the attachment proceedings, and a substitute for the levy made thereunder. I understand this to be putting the denial of the motion on the ground that the giving of the undertaking is a substantial continuation of the lien on the attached property, and that a discharge is not a bar in such a case. Without any consideration of the question on which the courts below and the court in Massachusetts in *Carpenter* v. *Turrell* (100 Mass., 450) are at variance, it is quite certain that the effect of this defense, if interposed, will be to deprive the plaintiffs of a fair and honest advantage they had obtained by their diligent pursuit of legal means and remedies. And there is presented to the court a strong case of an injustice to be wrought by the forms of law if this plea is received.

It is said that it is the rightfully overbearing effect of the Federal law upon the State law and practice, and that the discharge from the debts having been given to these defendants in pursuance of paramount law, the courts of this State must give full effect to it. But is that just the position in which the courts of this State are placed? First, the courts are not denying to the discharge its appropriate effect, after it is in due form and regularity brought to their judicial knowledge. They cannot, upon motion and upon affidavits, allow the effect of this discharge upon the debts claimed by the plaintiffs, and adjudge that the defendants go thereof without day. The discharge must be brought before the court to be available for a final judgment thereon against the plaintiffs, upon a formal averment thereof by answer, with a day to the plaintiffs in court to contest its validity and to put the defendants to their proof. As yet it is a thing asserted, not proven. And the application to the court is for leave to plead and prove it after the defendants have raised other issues, have to some extent tried them, and have taken other proceedings in the action hostile to the plaintiffs. May not the courts say that here is a case for the exercise of the discretion reposed in us, to determine whether the leave to put in this new defense would not work injustice to a party to a suit?

May they not say, we decline to permit a new issue upon the record in this action, which, if it should be tried, might defeat the plaintiffs and deprive them of a proper advantage which they have lawfully obtained? If it has been shown that the courts had the right to order from their files, under the old practice, a plea *puis darrien*, the prevalence of which in the suit would be an injustice to the plaintiff, and that the courts under the new practice may reach the same end by refusing leave to put in such a plea, then is not this a case which gives room for the exercise of discretion whether the power so to do should not be used. Again, a discharge is not a bar to an action in any stage without being pleaded (*Cornell* v. *Dakin*, 38 N. Y., 253), and if the defendant is too late to plead, either originally or by amendment, the remedy, it seems, is by motion for a perpetual stay of execution. (*Monroe* v. *Upton*, 50 N. Y., 593,) So that the defendants are not without reasonable opportunity to present their discharge to the courts of this State, and obtain for it the effect to which it is entitled. Moreover, though the discharge should be effectual to bar an ordinary claim, or even the claim of the plaintiff in the position in which it was when the defendants obtained their discharge, still it is against the spirit of the Bankrupt Act that this debt should be thus affected. Tho plaintiffs were lien-creditors at one time, and would have so continued but for the defendants availing themselves of a privilege given by a statute of this State, which the Bankrupt Act did not afford to them. The plaintiffs acquired their lien more than four months before the commencement of the defendants' proceeding in bankruptcy. Such a lien the Bankrupt Act exempts from the operation of the assignment of the bankrupt's effects, and had the attachments remained undischarged, the plaintiffs would have held their debt secure.

It is said, that if the defendants are not permitted to plead their discharge, and judgment goes against them, then the obligation of the sureties will be fixed, and they, paying their undertaking, will have a claim against the defendants, not barred by the discharge. Without inquiring if this be

so, let it be conceded. This, too, is in the spirit of the Bankrupt Act; for no discharge releases a person liable for or with the bankrupt, as a surety; and if not released, and compelled to pay after discharge, he must have a good right to call upon his principal, the bankrupt, as the sureties will in this case.

The sureties were permitted by the Bankrupt Act to prove any debt for which they were liable, if the creditors did not. And see how far the courts have gone to sustain the right got by acquiring a lien. In *Peck* v. *Jenness*, 7 How. (U. S.), 612, it was held, under the Bankrupt Act of 1841, that a lien, by attachment, was one saved by the provisions of that act; that though a discharge had been granted to the attachment-debtor, and had been pleaded by him, that it did not affect the lien, nor prevent the plaintiff from taking a qualified judgment, condemning the attached property, though a discharge had been pleaded; and the Bankrupt Act provided that it might be pleaded in full and complete bar to all suits.

This case shows that the strict letter of a section of the act was made to yield to the provisions and policy of it in relation to prior liens.

On the whole, it seems that the spirit of our own statute, and the spirit of the Bankrupt Act, will be satisfied; and that injustice will be avoided, if this case shall be put in the class of those in which it is discretionary with the courts to refuse leave to put in a supplemental answer.

It follows, that the appeal from the order should be dismissed with costs.

All concur, except Rapallo, J., not voting.

Appeal dismissed.

UNITED STATES SUPREME COURT

A devise of property to cease on the bankruptcy of the devisee is good, and the limitation valid.

If a will confers an absolute discretion on a trustee, which he is under no obligation to exercise in favor of the bankrupt, it does not grant such an interest to the latter as his assignee can assert.

A devise of property to a trustee to pay the income thereof to a third person, free from liability for his debts, is not such an interest as will pass to the latter's assignee.

NICHOLS, Assignee, etc., v. *EATON et al.*

Appeal from the Circuit Court of the United States for the District of Rhode Island.

MILLER, J.—The controversy in this case arises on the construction and legal effect of certain clauses in the will of Mrs. Sarah B. Eaton. At the time of her death, and at the date of her will, she had three sons and a daughter, being herself a widow, and possessed of large means of her own. By her will she devised her estate, real and personal, to three trustees, upon trusts, to pay the rents, profits, dividends, interest, and income of the trust property to her four children equally, for and during their natural lives, and, after their decease, in trust for such of their children as shall attain the age of twenty-one, or shall die under that age having lawful issue living, subject to the condition that if any of her children should die without leaving any child who should survive the testatrix and attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon the trusts declared in said will concerning the other share or respective shares. The will also contained a provision that if her said sons respectively should alienate or dispose of the income to which they were entitled under the trusts of the will; or if, by reason of bankruptcy or insolvency, or any other means whatsoever, said income could no longer be personally enjoyed, by them respectively, but the same would become vested in or payable to some other person, then the

trust expressed in said will concerning so much thereof as would so vest should immediately cease and determine. In that case, during the residue of the life of such son, that part of the income of the trust fund was to be paid to the wife and children, or wife or child, as the case might be, of such son; and in default of any objects of the last-mentioned trust, the income was to accumulate in augmentation of the principal fund.

There is another proviso which, as it is the main ground of the present litigation, is here given verbatim, as follows:

"Provided, also, that in case at any future period circumstances should exist which, in the opinion of my said trustees, shall justify or render expedient the placing at the disposal of my said children respectively any portion of my said real and personal estate, then it shall be lawful for my said trustees, in their discretion, but without its being in any manner obligatory upon them, to transfer absolutely to my said children respectively, for his or her own proper use and benefit, any portion not exceeding one-half of the trust fund from whence his or her share of the income under the preceding trusts shall arise; and immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the trust fund as shall be so transferred, shall absolutely cease and determine. And in case of the cessation of said income as to my said sons respectively, otherwise than by death, as hereinbefore provided for, it shall be lawful for my said trustees, in their discretion, but without its being obligatory upon them, to pay to or apply for the use of my said sons respectively, or for the use of such of my said sons and his wife and family, so much and such part of the income to which my said sons respectively would have been entitled under the preceding trusts in case the forfeiture hereinbefore provided for had not happened."

The daughter died soon after the mother, without issue and unmarried. The defendant, Amasa M. Eaton, one of the sons of the testatrix, failed in business and made a general assignment of all his property to Charles A. Nichols, for the benefit of his creditors in March, 1867, and in December,

1868, was, on his own petition, declared a bankrupt, and said Nichols was duly appointed his assignee in bankruptcy. The defendant was then, and during the pendency of this suit, unmarried and without children. The executors and trustees of the will, were William M. Bailey and George B. Ruggles, a son of testatrix by a former husband, and her son, Amasa M. Eaton, the present defendant and bankrupt.

It will be seen at once that whether we look to the assignment before bankruptcy, or to the effect of the adjudication of bankruptcy and the appointment of Nichols as assignee in that proceeding, one of the conditions had occurred on which the will of Mrs. Eaton had declared that the devise of a part of the income of the trust estates to Amasa M. Eaton should cease and determine, and as he had no wife or children in whom it could vest, it became, by the alternative provision of the will, a fund to accumulate until his death, or until he should have a wife or child who could take under the trust.

But Nichols, the assignee, construing the whole of the will together, and especially the proviso which we have given verbatim, to disclose a purpose, under cover of a discretionary power, to secure to her son the right to receive to his own use the share of the income to which he was entitled before the bankruptcy, in the same manner afterwards as if that event had not occurred, brought this bill to subject that income to administration by him as assignee in bankruptcy for the benefit of the creditors. His claim is founded on the proposition ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment, free from liability for his debts, is void, on grounds of public policy, as being in fraud of the rights of creditors, or, as expressed by Lord Eldon in *Brander* v. *Robinson* (18 Vesey, 429), "if property is given to a man for his life the donor cannot take away the incidents of a life estate."

There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does

the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? And, 2d, if so, is that principle to be the guide of a court of the United States sitting in chancery?

Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brander* v. *Robinson*, seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of devisee, is good, and that the limitation is valid. (*Dommett* v. *Bedford*, 3 Ves., 149; *Brander* v. *Robinson*, 18 Ves., 429; *Rochford* v. *Hackman*, 9 Hare, 475; Lewin on Trusts, 80, Chapter vii., Section 2; *Tillinghast* v. *Bradford*, 5 R. I., 205.)

If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee the trust as to him should cease and determine or if there had been a simple provision that in such event that part of the income of the estate should go to some specified person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child, or children of such bankrupt, and in such manner as said trustees in their discretion shall think proper. There does not seem to be any doubt that if the bankrupt devisee had a wife or child living to take under this branch of the will, that there would be nothing left which could go to his assignee in bankruptcy. The cases on this point are well considered in Lewin on Trusts, above cited, and the doctrine may be stated that a direction that the trust to the first taker shall cease on his bankruptcy, and shall then go to his wife or children, is valid, and the entire interest passes to them, but that if the devise be to *him* and his wife or children, or if he is in any way to receive a vested interest, that interest, whatever it may be, may be separated from those of his wife or children, and be paid over to his assignee. (*Page* v. *Way*, 3 Beav., 20; *Piercy* v. *Roberts*, 1 Myl. & K., 4; *Rippon* v.

Norton, 2 Beav., 63; *Lord* v. *Bunn*, 2 Younge & C. N. R., 98.) Where, however, the devise over is for the support of the bankrupt and his family, in such manner as the trustees may think proper, the weight of authority in England seems to be against the proposition that anything is left to which the assignee can assert a valid claim. (*Twopenny* v. *Peyton*, 10 Simons, 487; *Godden* v. *Crowhurst*, Ib., 642.)

In the case before us the trustees are authorized, in the event of the bankruptcy of one of the sons of testatrix without wife or children, which is the condition of the trust as to Amasa M. Eaton, to loan and reinvest that portion of the income of the estate in augmentation of the principal sum or capital of the estate until his decease, or until he shall have wife or children capable of receiving the trust of the testatrix forfeited by him.

There does not seem thus far any intention to secure or revest in the bankrupt any interest in the devise which he had forfeited, and there can be no doubt that but for the subsequent clauses of the will there would be nothing in which the assignee could claim an interest. But there are the provisions that the trustees may, at their discretion, transfer at any time to either of the devisees the half or any less proportion of the share of the fund itself which said devisee would be entitled to if the whole fund were to be equally distributed, and the further provision that in case of the *cesser* of income provided for in case of bankruptcy or other cause, it shall be lawful, but not obligatory on her said trustees, to pay to said bankrupt or insolvent son, or to apply for the use of his family, such and so much of said income as said son would have been entitled to in case the forfeiture had not happened.

It is strongly argued that these provisions are designed to evade the policy of the law already mentioned, that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt.

The two cases of *Twopenny* v. *Peyton* and *Godden* v. *Crow-*

hurst, above cited from 10 Simons, seem to be in conflict with this doctrine; while the cases cited in appellant's brief go no further than to hold that when there is a right to support or maintenance in the bankrupt, or the bankrupt and his family, a right which he could enforce, then such interest, if it can be ascertained, goes to the assignee.

No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee, a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt, confers such an interest on the latter, that he or his assignee in bankruptcy can successfully assert it in a court of equity, or any other court.

As a proposition, then, unsupported by any adjudged case, it does not commend itself to our judgment on principle. Conceding to its fullest extent the doctrine of the English courts, their decisions are all founded on the proposition that there is somewhere in the instrument which creates the trust a substantial right, a right which the appropriate court would enforce, left in the bankrupt after his insolvency, and after the *cesser* of the original and more absolute interest conferred by the earlier clauses of the will. This constitutes the dividing line in the cases which are apparently in conflict. Applying this test to the will before us, it falls short, in our opinion, of conferring any such right on the bankrupt. Neither of the clauses of the provisos contain anything more than a grant to the trustees of the purest discretion to exercise their power in favor of testatrix's sons. It would be a sufficient answer to any attempt on the part of the son in any court to enforce the exercise of that discretion in his favor, that the testatrix has in express terms said that such exercise of this discretion is not "in any manner obligatory upon them," words repeated in both these clauses. To compel them to pay any of this income to a son after bankruptcy, or to his assignee, is to make a will for the testatrix which she never made; and to do it by a decree of a court, is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it. When trustees are

in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. Hill on Trustees, 486; Lewin on Trusts, 538; *Boss* v. *Goodsall*, 1 Younge & C. N. R., 617; *Madison* v. *Andrew*, 1 Ves. Sr., 57, 60. And certainly they would not do so in violation of the wishes of the testator.

But while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner. We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a *necessary* incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has engrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate in corporations and ecclesiastical bodies. We also admit that there is a just and sound policy peculiarly appropriate to the jurisdiction of courts of equity to protect creditors against frauds upon their rights, whether they be actual frauds or constructive frauds. But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors. Whatever may be the extent of those rights in England, the policy of the States of this Union, as expressed both by their statutes and the decisions of their courts has not been carried so far in that direction.

It is believed that every State in the Union has passed statutes by which a part of the property of the debtor is exempt from seizure on execution or other process of the courts. In short, is not by law liable to the payment of his debts. The extent and nature of this exemption varies in the different States. In some it extends only to the merest implements of household necessity. In others, it includes the library of the professional man, however extensive, and the tools of a mechanic; and in many, it embraces the homestead in which the family resides. This has come to be considered in this country as a wise, as it certainly may be called a settled policy in all the States. To property so exempted, the creditor has no right to look, and does not look, as a means of payment when his debt is created. And while this court has steadily held, under the constitutional provision against impairing the obligations of contracts by State laws, that such exemption laws when first enacted are invalid as to debts then in existence, it has always held that as to contracts made thereafter, the exemptions were valid.

This distinction is well founded in the sound and unanswerable reason, that since the creditor knows when he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment, he is neither defrauded nor injured by the application of the law to his case. Nothing is withdrawn from this liability which was ever subject to it, or to which he had a right to look for its discharge in payment. The analogy of this principle to the devise of the income from real and personal property for life seems perfect. In this country all wills or other instruments creating such trust estates, are recorded in public offices, where they may be inspected by every one, and the law in

such cases imputes notice to all persons concerned of all the facts which they might know by the inspection. When, therefore, it appears by the record of a will, that the devisee holds this life estate or income, dividends or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows that in contracting a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such devise.

Nor do we see any reason in the recognized nature and tenure of property, and its transfer by will, why a testator who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so is not readily perceived.

These views are well supported by adjudged cases in the State courts of the highest character.

In the case of *Fisher* v. *Taylor*, 2 Rawle, 33, a testator had directed his executors to purchase a tract of land, take the title in their name in trust for his son, who was to have the rents, issues, and profits of it during his life, free from liability for any debts then or thereafter contracted by him. The Supreme Court of Pennsylvania held that this life estate was not liable to execution for the debts of the son. "A man," says the court, "may undoubtedly dispose of his land so as to secure to the object of his bounty, and to him exclusively, the annual profits. The mode in which he accomplishes such a purpose, is by creating a trust estate, explicitly designating the uses and defining the powers of the trustees. * * * * Nor is such a provision contrary to the policy of the law, or to any act of Assembly. Creditors cannot complain because

they are bound to know the foundation on which they extend their credit."

In the subsequent case of *Holdship* v. *Patterson*, 7 Watts, 547, where the friends of a man made contributions by a written agreement to the support of himself and family, the court held that the installments which they had promised to pay could not be diverted by his creditors to the payment of his debts, and Gibson, Chief Justice, remarks, that "the fruit of their bounty could not have been turned from its object by the defendant's creditors, had it been applicable, by the terms of the trust to his personal maintenance; for a benefactor may certainly provide for the maintenance of a friend without exposing his bounty to the debts or imprudence of the beneficiary."

In the same court, as late as 1864, it was held that a devise to a son of the rents and profits of an estate during his natural life, without being subject to his debts and liabilities is a valid trust; and the estate being vested in trustees, the son could not alienate. (Shankland's Appeal, 47 Penn., 113.) The same proposition is either expressly or impliedly asserted by that court in the cases of *Ashurst* v. *Given*, 5 Watts & Ser., 323; *Brown* v. *Williamsons' Ex.*, 36 Penn., 338; *Still* v. *Spear*, 45 Penn., 168.

In the case of *Leavitt* v. *Bierne* (21 Conn., 1), WAITE, Justice, in delivering the opinion of the court, says: "We think it in the power of a parent to place property in the hands of trustees for the benefit of a son and his wife and children, with full power in them to manage and apply it at their discretion, without any power in the son to interfere in that management or in the disposition of it until it has actually been paid over to him by the trustees." And he proceeds to argue in favor of the existence of this power, from the vicious habits or intemperate character of the son, and the right of the father to provide against these misfortunes.

In the case of *Nickell et al.* v. *Handly et al.* (10 Gratt., 336) the court thus expresses its view on the general question, though not, perhaps, strictly necessary to the judgment in that case: "There is nothing in the nature or law of

property which would prevent the testatrix, when about to die, from appropriating her property to the support of her poor and helpless relatives, according to the different conditions and wants of such relatives; nothing to prevent her from charging her property with the expense of food, raiment, and shelter for such relatives. There is nothing in law or reason which should prevent her from appointing an agent or trustee to administer her bounty."

In the case of *Pope's Executors* v. *Elliott & Co.* (8 B. Mon., 56) the testator had directed his executors to pay for the support of Robert Hope the sum of twenty-five dollars per month. Robert Hope, having been in the Rocky Mountains until the sum of two hundred and twenty-five dollars of these monthly payments had accumulated in the hands of the executors, his creditors filed a bill in chancery, accompanied by an attachment, to subject this fund to the payment of their debt. The Court of Appeals of Kentucky say that it was the manifest intent of the testator to secure to Robert the means of support during his life to the extent of twenty-five dollars per month or three hundred dollars per year, and that this intent cannot be thwarted, either by Robert himself by assignment or alienation, or by his creditors seizing it for his debts, unless the provision is contrary to law or public policy. And after an examination of the statutes of Kentucky and the general principles of equity jurisprudence on this subject, hold that neither of these are invaded by the provision of the will.

The last case we shall refer to especially is that of *Campbell* v. *Foster* (35 N. Y., 361). In that case it is held, after elaborate consideration, that the interest of a beneficiary in a trust fund created by a person other than the debtor, cannot be reached by a creditor's bill; and while the argument is largely based upon the special provision of the statute regulating the jurisdiction of the court in that class of cases, the result is placed with equal force of argument on the general doctrines of the court of chancery, and the right of the owner of property to give it such direction as he may choose without its being subject to the debts of those upon whom he intends to confer his bounty.

We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine in the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this. Nor has the time which the pressure of business in this court authorizes us to devote to this case, permitted of any further examination into the decisions of the State courts. We have indicated our views in this matter, rather to forestall the inference that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, than because we have felt it necessary to decide it, though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them.

Other objections have been urged by counsel, such as that the bankrupt is himself one of the trustees of the will, and will exercise his discretion favorable to himself. But there are two other trustees, and it requires their joint action to confer on him the benefits of this trust. It is said that one of them is mentally incompetent to act, but this is not established by the testimony. It is said, also, that since his bankruptcy, the defendant Amasa, has actually received twenty-five thousand dollars of this fund, and that should go to the assignee, as it shows conclusively that the objections to the validity of the will, were well founded.

But the conclusive answer to all these objections is, that by the will of decedent, a will which, as we have shown, she had a lawful right to make, the insolvency of her son terminated all his legal vested right in her estate, and left nothing in him which could go to his creditors or to his assignees in bankruptcy, or to his prior assignee; and that what may have come to him after his bankruptcy through the voluntary action of the trustees under the terms of the discretion reposed in them, is his lawfully, and cannot now be subjected to the control of his assignee.

The decree of the Circuit Court is, therefore, affirmed.

UNITED STATES SUPREME COURT.

Where the conveyance was moderate in amount and all the debts of the grantor in existence at the time thereof have since been paid, it cannot be impeached by the grantor's assignee although it was voluntary.

THOMAS SLATER SMITH, ESTHER A., his wife, and JAMES S. JENKINS, Appellants, v. *WILLIAM VOGDES, assignee of THOMAS SLATER SMITH, a bankrupt.*

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

SWAYNE, J.—The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may, and do so supervene, the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. (*Sexton* v. *Wheaton*, 8 Wheat., 229; *Mullen* v. *Wilson*, 44 Penn., 413; *Stileman* v. *Ashdown*, 2 Atk., 477.)

Fraud is always a question of fact to be determined by the court or jury upon a careful scrutiny of the evidence before it.

The view which we take of this case renders it unnecessary to consider the objections urged by the counsel of the appellants against the reference to the master, the exceptions to the master's reports, and the questions raised by the demurrers to the original and the amended bill.

Passing by these subjects, and looking only to the merits of the controversy, two points to be examined arise. They involve questions of fact which must be solved in the light of the evidence found in the record. The burden of proof rests upon the appellee.

1. What was the pecuniary condition of the bankrupt when the property in question was bought at the sale under execution and conveyed by the sheriff to Esther A. Smith?

The date of the transaction was the 2d of June, 1862. The amount paid was fourteen hundred and fifty dollars. The property consisted of a dwelling-house and store-room, which she had leased in the year 1859. The rent was one hundred and fifty dollars per year. She and her husband occupied the premises up to the time of the sale. She kept a dry-goods store and a millinery and dressmaking establishment in her own name. She was eminently successful. The bill avers and admits that at the time of the purchase of the property she had realized profits to the amount of ten thousand dollars, and that the property was paid for out of this fund. There is proof in the record to the same effect. In conducting her business, she paid promptly, and it does not appear that she then or subsequently owed anything which is unpaid. The husband had paid all his debts except two. For those he had given extension notes having short times to run, and they were paid at maturity.

This investment for the benefit of the wife was never challenged by any creditor of the husband or the wife, and it is not now challenged in behalf of any creditor whose debt subsisted then or accrued for a considerable time afterwards. Under the circumstances, the investment was moderate in amount, proper to be made, and, we think, liable to no legal objection as to its validity. The testimony to be considered in connection with the next point throws a backward light which is also favorable to the wife with respect to this part of the case.

2. What was the pecuniary condition of the bankrupt when he extinguished the ground rent by which the property was encumbered?

The money was paid about the 1st of January, 1866, and the amount was three thousand dollars.

After the 1st of January, 1863, the business which had before been carried on in the name of the wife, was conducted

in that of the husband. It continued to be prosperous for several years. He thinks he made from ten to fifteen thousand dollars a year. He sold, the first year, from fifty to sixty thousand dollars' worth of goods. Such is his testimony, and it is uncontradicted. He paid all his debts, and considered himself in independent circumstances. His standing was such that he had no difficulty in buying goods on credit. A merchant says:

"His credit was good. I was willing and anxious to sell him all the goods I could."—(Corbin's testimony.) The cashier of the Fourth National Bank, speaking of his credit in that institution between the years 1864 and 1868, says: "He was able to get all he asked for, which was the greatest amount at one time, five thousand dollars, only on account of his average good balance in bank."—(McMullen's testimony.)

No debt now exists which existed prior to 1868, and there is none now existing which can be said in any sense to stand in renewal or continuity of any such prior debt.

In the early part of 1867 there was a marked reflux in the tide of prosperity throughout the country. It swept many of those exposed to it into hopeless insolvency. The bankrupt became embarrassed and depressed. His wife proposed to relieve him by making a loan of four thousand dollars, to be secured by a mortgage upon the property in question. This suggestion was carried out. The loan was made and the mortgage given in March, 1867. The money was paid over to his creditors. This enabled him for a time to weather the storm. But times grew worse. The shrinking in the value of dry goods was immense. He testifies that muslins for which he paid seventy cents per yard he was compelled to sell for twenty.

His loss by shrinkage he estimates at twenty thousand dollars. In 1868, when his stock had been reduced in value to about twenty thousand dollars, he sold it for that sum to the clerks, all females and relatives, who had been employed in the store, and took their notes accordingly. These notes

he indorsed to his creditors. Some of them have been paid, and others not. When the stock in the hands of the vendees had been reduced to a remnant, worth about two thousand dollars, it was sold under process in favor of his wife for the payment of the accumulated rents due to her.

The mortgage to secure the loan of four thousand dollars is still unsatisfied.

The bankrupt testifies that his failure was due to the losses of a firm, of which he was a member, and that but for that connection he would still be in prosperous circumstances.

We think the payment of the three thousand dollars to extinguish the ground rent was honestly made, and was warranted by the condition at that time of the bankrupt's affairs. They were then prosperous, and he had no reason to anticipate the reverses which followed. If there could otherwise be any doubt as to the integrity of this transaction, it is removed by the loan and mortgage, and the application of the money borrowed. If there had been a purpose to defraud when the property was bought or the ground rent extinguished, the mortgage would not have been given. It is entirely inconsistent with such an idea. The loan replaced the amount paid for the ground rent, with an excess of one thousand dollars; and it equalled the amount paid for both the property originally and in extinguishment of the ground rent, less four hundred and fifty dollars.

We hold the transactions both as to the ground rent and the original purchase to have been honest and valid.

Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested or to recover the money. (*Oliver* v. *Piatt*, 3 How., 333, 401.)

Lord Ellenborough held, that the same rule is applicable at law. (*Taylor* v. *Plummer*, 3 Maule & L., 562.)

It was claimed by the counsel for the appellants, that if the transactions here in question should be adjudged fraudu-

lent, the assignees would only have a lien upon the premises for the amount to which it might be held he was entitled, with interest.

The conclusions at which we have arrived upon the facts render it unnecessary to consider the law of the remedy.

The decree of the Circuit Court is reversed, and the case will be remanded to that court with directions to dismiss the bill.

UNITED STATES SUPREME COURT.

In an action by an assignee against an assignor of a note, evidence of the bankruptcy of the maker is admissible under an allegation that a suit against him would be unavailing.

When an adjudication of bankruptcy is proved, the party who alleges that the proceedings have been dismissed must prove the time of dismissal.

Under the laws of Illinois an adjudication of bankruptcy is a sufficient excuse to an assignee for not instituting suit against the maker of the note.

JOHN S. WILLS, JAMES G. WILLS, WASHINGTON M. WILLS and RICHARD GREGG, Plaintiffs in Error, v. *HORACE B. CLAFLIN, EDWARD E. EAMES, and EDWARD W. BANCROFT.*

In error to the Circuit Court of the United States for the Northern District of Illinois.

DAVIS, J.—Horace B. Claflin & Co., assignees of certain promissory notes, sued Wills, Gregg & Co., assignors of said notes, on their contract of assignment, which was made in the State of Illinois, and the inquiry is whether a case of liability was made out on the trial, under the peculiar provisions of the statute of Illinois on the subject. This statute makes promissory notes assignable by indorsement in writing, so as to vest the legal interest in the assignee: but the liability of the assignor is not absolute, but conditional. He agrees to

pay the note if the assignee, by the exercise of due diligence, prosecutes the maker to insolvency; but if the institution of a suit against the maker would be unavailing, or if the maker, when the note falls due, is out of the jurisdiction of the court, and, therefore, beyond the reach of legal process, the assignor is equally as liable as if due diligence by suit had been used. (Gross' Compilation, 1879, 462.)

There was no attempt to coerce payment of the makers by suit, and this action proceeds on the theory that the assignees were excused, under the circumstances, from instituting it. The declaration avers insolvency, non-residence, and that a suit would have been unavailing. On the trial the Circuit Court, against the objections of the defendants, admitted evidence that a petition in bankruptcy was filed January 20, 1870, in the United States District Court in Missouri, at Milwaukee, against Kimball & Butterfield, the makers of the notes sued on, and a judgment of adjudication, January 29, 1870. The admission of this evidence is assigned for error on the ground that there was no allegation in either count of the declaration which justified it or the charge of the court that the adjudication in bankruptcy excused the assignees from instituting suit against the makers.

There are two averments in the second count of the declaration, as follows:

1st. "And the plaintiffs aver that at the time when each of said promissory notes became, by its terms, due and payable, the said Simeon Pickard, and the said Kimball, and the said Butterfield, were each and all insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any part thereof, and hitherto from thence have continued insolvent and unable to pay the amount of the notes by them respectively subscribed as aforesaid, or any portion thereof."

2d. "And the said plaintiffs aver that the institution of a suit against the said Simeon Pickard, or against the said Kimball, or the said Butterfield, at the time the notes so by them as aforesaid respectively subscribed, became due and

payable, or at any time since, or now, would have been, and would be wholly unavailing."

It is contended that these two averments must be treated as one, and that they mean that the suit would be unavailing by reason of the insolvency of the makers.

If this were so, it would by no means follow that the record from Wisconsin was inadmissible to sustain that issue; but be this as it may, as we construe these averments, they are distinct and independent of each other. The first is complete in itself, because, if the makers were insolvent, it would be idle to bring a suit against them. But there are other things besides insolvency which might render a suit unavailing, as, for instance, want of consideration in the note, or, as in this case, an adjudication in bankruptcy.

The second averment was not limited to any particular cause, but was general in its character, and left the pleader free to show on the trial any reason why a suit would be unavailing.

It is true the pleading was objectionable because it did not contain specifications enough to enable the party to defend himself (*Crouch* v. *Hall*, 15 Ill., 263), and if this objection had been taken by demurrer, it would have prevailed. But the question here is not whether a demurrer was sustainable, but whether the pleading was good after verdict.

"At common law, after verdict, if the issue joined be such as necessarily to require on the trial proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict."—(1 Chitty's Pleadings, 10th American edition, p. 673, and cases cited in note.) And this rule is adopted in Illinois. In *Greathouse* v. *Robinson*, 4 Ill., 7, it was held that the defendant, to avail himself of a defective averment in a declaration, must demur to it. "If he elects to plead to the declaration and go to trial, he has no right to insist upon the exclusion of evidence because some necessary averment is omitted or defectively set

forth." There was, therefore, no valid reason why the record of the adjudication of bankruptcy should have been excluded. It was not only competent evidence in support of the issue that a suit against the makers would have been unavailing, but conclusive evidence on the point, for the bankrupt act prevents the institution and prosecution of suits against parties in bankruptcy.

The first note was due January 18, 1870, two days before the petition in bankruptcy was filed, and the first term of court held at Chicago after the note became due was on the first Monday of the following month. At this time, the adjudication in bankruptcy was in force, and a suit against the bankrupts forbidden.

There was parol testimony (received without objection) to show that the debts of the petitioners were settled, and the proceedings in bankruptcy dismissed, but there was nothing to fix the time when the order of dismissal was made. The burden of doing this rested on the defendants, and so the jury were told.

As this view of the case is decisive of it, it is unnecessary to notice the other assignment of error.

The judgment is affirmed.

UNITED STATES SUPREME COURT.

An assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent; and when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy, subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.

FREDERICK J. MAYER and SETH EVANS v. *MAX. HELLMAN, Assignee.*

In error to the Circuit Court of the United States for the Southern District of Ohio.

Mayer et al. v. Hellman, Assignee.

FIELD, J.—The plaintiff in the court below is assignee in bankruptcy of Bogen and others, appointed in proceedings instituted against them in the District Court of the United States for the Southern District of Ohio; the defendants are assignees of the same parties, under the assignment laws of the State of Ohio; and the present suit is brought to obtain possession of property which passed to the latter under the assignment to them. The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: On the 3d of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution and the property was taken possession of by the assignees.

By the law of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before the probate judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the probate court and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the probate judge of the proper county in Ohio, produced the original assignment, and filed the same in the probate court. One of the trustees having declined to act, another one was named in his place by the creditors and appointed by the court. Subsequently the three gave an undertaking with sureties, approved by the judge, in the sum of five hundred thousand dollars, for the performance of their

duties, and then proceeded with the administration of the trust under the direction of the court.

On the 22d of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As such officer he claims a right to the possession of the property in the hands of the defendants under the assignment to them. The validity of this claim depends, as a matter of course, upon the legality of the assignment. Independently of the Bankrupt Act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands, but unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hinderance and delay to particular creditors in their efforts to reach, before others, the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction.

The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose, it sets aside all transactions had within a proscribed period

previous to the petition in bankruptcy, defeating, or tending to defeat, such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period, by which a preference can be secured to one creditor over another, or the purposes of the act evaded. That period is four months for some transactions, and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act.

Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding.

The counsel of the defendants have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the Bankrupt Act, though made within six months previous to the filing of the petition. Their argument is, that such an assignment is only a voluntary execution of what the Bankrupt Court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice Nelson, in the

Circuit Court of New York, in *Sedgwick* v. *Place*, 1 N. B. R., 673; and of Mr. Justice Swayne, in the Circuit Court of Ohio, in *Langley* v. *Perry*, 2 N. B. R., 596. Certain it is, that such an assignment is not absolutely void; and if voidable, it must be because it may be deemed, perhaps, necessary for the efficiency of the Bankrupt Act that the administration of an insolvent's estate shall be intrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent. It is unnecessary, however, to express any decided opinion upon this head, for the decision of the question is not required for the disposition of the case.

In the argument of the plaintiff's counsel, the position is taken that the Bankrupt Act suspends the operation of the Act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that that Statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the Statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State, but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of

Congress suspends all proceedings under the insolvent law of the State, has no application.

The assignment in this case being, in our judgment, valid and binding, there was no property in the hands of the defendants which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all the creditors were satisfied. If a contingency should ever arise for the assertion of this right, the assignee in bankruptcy may, perhaps, have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now.

Our conclusion is, that the court below erred in sustaining the demurrer to the defendant's answer; and the judgment of the court must, therefore, be reversed, and the cause remanded for further proceedings.

UNITED STATES SUPREME COURT.

The debt due to a stockholder for losses sustained by him on policies issued by the corporation cannot be set off against his indebtedness to the corporation for unpaid subscriptions to its stock.

A claim for losses on policies of insurance may be set off against an indebtedness from the holder to the company for money deposited with him as a banker.

J. YOUNG SCAMMON v. *MARK KIMBALL, Assignee of the MUTUAL SECURITY INS. CO.*

APPEAL from the Circuit Court for the Northern District of Illinois.

CLIFFORD, J.—Jurisdiction is vested in the Circuit Courts under the Bankrupt Act, concurrent with the District Court

for the same district, of all suits at law or in equity which may or shall be brought by any person against the assignee of the bankrupt's estate, touching any property or rights of property of the bankrupt, transferable to, or vested in such assignee.

Pursuant to that authority, the appellant on the 3d of May, 1872, filed the present bill of complaint in the Circuit Court against the appellee, as assignee of the bankrupt company described in the title of the case. Prior to that, to wit, on the 27th of January, in the same year, the insurance company was duly adjudged bankrupt, and the record shows that the present appellee was appointed the assignee of the estate of the bankrupt company.

Satisfactory evidence is exhibited in the record to show that the company was duly organized with a nominal capital of three hundred thousand dollars, of which ten per cent. had been paid, and that the residue was secured by the notes of the subscribers. Provision is made by the charter that the stock and affairs of the corporation shall be managed and conducted by any number of directors, not more than twenty-five nor less than nine, to be chosen by ballot from among, and by, the stockholders. Directors, it is also provided, shall choose out of their number a president, vice-president, and the directors have the power to appoint, for the time being, "such officers, secretaries, agents, and servants, as they shall judge necessary."

Shares in the stock of the company, to a large amount, were owned by the complainant, and he admits that the company held notes against him to the amount of ten thousand one hundred and forty-seven dollars and fifty cents, given to secure unpaid balances of subscriptions, for which he was liable either as principal, guarantor, or surety. Throughout the lifetime of the company, the complainant insured many and valuable properties in the company, and paid to the proper officers of the same large sums of money as premiums for such policies of insurance. Antecedent to the event which caused the failure of the company, the proper officers

of the same transacted a large, and, for the greater portion of the time, a prosperous insurance business.

Much reference to those details will not be made, as they are no longer material in this investigation. Suffice to say, in that connection, that the complainant was, as he alleges, during the whole of that period, a large owner of real and other property, and was possessed of sufficient means to render secure any moneyed obligation into which he might enter, and to enable him to perform any promise or contract for the payment of money he might make; and he also alleges that it was necessary that the means of the company should be kept where the same could be promptly commanded, if required to pay losses; and, in order that the company might accomplish that object and still realize interest on the same, he came to an agreement with the proper authorities of the company, that the funds thereof, or such portion of the same as they might choose, should thereafter, from time to time, be deposited with him, he being then a private banker, and that the moneys so deposited should be paid out or drawn at the pleasure of the company, without notice or limitation; and he avers that he agreed with the company to account with the proper officers for such moneys when and as often as thereto required, and to pay to the company interest thereon, at the rate of ten per centum annually, during the continuance of such deposit, until a further or other agreement should be made.

Funds of the kind contemplated were, in accordance with the agreement, deposited with the complainant at the pleasure of the company, and the complainant avers that he paid interest on the average amount of the same at the agreed rate, for the period and to the amount specified in the exhibit annexed to the bill of complaint.

Ten per centum per annum was paid during the period specified in the annexed exhibit, but it appears that the rate at the close of that period was reduced to eight per cent. per annum, and the complainant admits that no part of the interest since the rate was reduced has been paid.

Both parties, it seems, were solvent until the 9th of October, 1871, when a large part of the property of the complainant and others, which was insured by the company, was destroyed by fire, the immediate effect of which was to cause the failure of the insurance company. Losses of the complainant by the fire, for which the company is responsible, as claimed by the complainant, amount to the sum of fifty-five thousand eight hundred dollars, as appears by the second exhibit annexed to the bill of complaint, and he admits that he held on deposit at the time the company failed the sum of thirty-nine thousand one hundred and eighty-eight dollars and three cents, received under the agreement already fully described, which is due to the company with eight per cent. interest, from July 1st, 1871, to the 18th of December in the same year.

Process was accordingly issued, and the complainant prays that the respondent may be decreed to deliver to him the notes referred to; and that he, the respondent, shall acquit and discharge the complainant from the admitted indebtedness to the company; and that he, the complainant, be allowed to prove the balance of his demand against the estate of the bankrupt company; and that the respondent be enjoined and restrained from selling or assigning the said notes, and from instituting any suit against the complainant to recover the notes or his indebtedness to the company.

Service was made and the respondent appeared and filed an answer. He admits that the complainant was one of the original corporators and subscribers to the capital stock of the company; that only ten per cent. of the subscriptions for the capital stock was paid in cash, and that ninety per cent. of the same was secured in the promissory notes of the subscribers; that the company, at the time of the great fire, became insolvent, and that the company, on the day named in the bill, was adjudged bankrupt; that the company, as alleged, issued several policies of insurance to the complainant, and that he sustained large losses by the great fire; that he is indebted to the company as set forth in the third schedule

exhibited in the record, and that he was and is the holder of the funds of the company to the amount specified in the bill of complaint; but the respondent avers that the company never came to any such agreement in respect to such funds as that alleged, and that the complainant held the same solely in his official character as treasurer of the company.

Most of the allegations of the answer were also embodied in a cross-bill filed by the respondent at the same time, in which he denied all the equity of the original bill, and prayed for a decree in his own favor, and that the complainant in the original bill be decreed to pay over to him, as assignee, the whole amount he owed to the company, including the notes given for subscriptions for stock and the amount he held on deposit.

Proofs were taken, and the parties having been fully heard, the court dismissed the original bill of complaint, and entered a decree for the respondent in the sum of nine thousand five hundred and thirty-two dollars, being the amount of the promissory notes given for capital stock, and thirty-nine thousand one hundred and eight dollars and three cents, being the amount of the funds of the company held by the respondent in the cross-bill, with ten per cent. interest on both amounts. Immediate appeal was taken by the complainant in the original bill and respondent in the cross-bill, and he now seeks to reverse that decree.

Complainant's losses by the great fire, it is admitted, amount to forty-five thousand and fifteen dollars and thirty-three cents, and that the company is liable to him in that amount for such losses under the policies of insurance issued to the complainant prior to the fire.

Since the bill of complaint was filed in this case this court has decided that the debt due to a stockholder in such a case, for losses sustained by the stockholder of properties insured by the company, cannot be set off against his indebtedness to the company for unpaid shares in the capital stock of the company, for the reason that moneys arising from that source constitute a trust fund for the payment of the debts

of the company, which, in the due administration of the Bankrupt Law, must be equally divided among all the creditors of the bankrupt. (*Sawyer* v. *Hoag*, 9 N. B. R., 145; 17 Wall., 610.)

Such an indebtedness constitutes an exception to the rule that where there are mutual debts, "one debt may be set against the other," as originally provided by act of Parliament; or, perhaps, it would be more accurate to say, that the rule does not apply where it does not appear that the debts are not in the same right as well as mutual. (*United States* v. *Eckford*, 6 Wall., 484.)

Whether the suit be one at law or in equity, set-off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other, to set off their respective debts by way of mutual deduction; so that in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. (Adams' Eq., 6th Am. ed., 447.)

Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off of debts accruing in different rights, except under very special circumstances, and where the proofs are clear, and the equity is very strong. (2 Story's Eq., 6th ed., Section 1437.)

Equity regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue properties into whosesoever possession the same may be transferred, unless the stock or property has passed into the hands of a *bona fide* purchaser; and the rule is well settled, that stockholders are not entitled to any share of the capital stock, nor to any dividend of the profit, until all the debts of the corporation are paid. (*Railroad Co.* v. *Howard*, 7 Wall., 392.)

Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are the assets of the corporation, and as such constitute a fund for

the payment of its debts; and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be seized by a creditor on such process, and subjected to the payment of the indebtedness of the company; and where the fund has been improperly distributed among the stockholders, or passed into the hands of third persons, not *bona fide* creditors or purchasers, the established rule in equity is, if the debts of the company remain unpaid, that such holders take the fund charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of the debts of the corporation. (2 Story Eq., 9th ed., Section 1252; *Mumma* v. *Potomac Co.*, 8 Pet., 281; *Wood* v. *Dummer*, 3 Mason, 308; *Vose* v. *Grant*, 15 Mass., 505, 522; *Spear* v. *Grant*, 16 *Id.*, 9, 14; *Curran* v. *Arkansas*, 15 How., 304.)

Tested by these considerations, it is clear that the prayer of the bill of complaint, that the respondent may be directed to deliver to the complainant the notes referred to, must be denied.

Claim for losses due from the company cannot be set off against the notes given for capital stock. Suppose that is so, still the complainant insists that such claims for losses may be set off against the amount due from him to the company for the moneys of the company deposited with him under the agreement set forth in the bill of complaint.

Matters alleged in the bill of complaint, and denied in the answer, must be proved before such matters can be assumed as true by the court. Concede that, and it follows that the important question remains to be considered, whether there was such an agreement between the complainant and the company, in respect to the moneys deposited with the complainant, as that set forth in the bill of complaint.

Moneys, to a large amount, were deposited with the complainant, and it is not denied that he paid interest on the same to the amount of eleven thousand seven hundred and ninety-nine dollars and ninety-six cents, as shown by the first schedule annexed to the original bill; but the respondent in

the original bill and complainant in the cross-bill alleges, that the complainant in the original bill received and held all such sums as treasurer of the company, and that the balance in his hands is a trust fund belonging to all creditors, and consequently that his claim for losses under the policies issued to him by the company cannot be set off against his indebtedness to the company for the balance of that fund in his hands. He admits that he was elected to the office of treasurer by the directors, in the month of July, 1870, and that he was reappointed thereto during the following year, but he denies that he ever accepted the office, or that he ever qualified as such, or that he held in his custody any money whatever as treasurer of the company. Subsequently he was examined as a witness in the case, and testified that he never qualified as treasurer, or gave bond, and never had any other or different relations with the company in respect to its funds than such as existed before he was elected.

What he states in respect to the alleged agreement is substantially as follows: that he agreed at the first meeting of the directors, to receive all moneys paid to the company, and to allow the company ten per cent. interest upon it, payable annually, until he should notify the company to the contrary, or a different arrangement should be made between the parties, the purpose of the directors being to have the money at all times available, as far as possible, and at the same time to get interest on it; and he says that he made the offer, not because it was of advantage to him, but to encourage the company.

Sufficient appears to show that the complainant was at that time a private banker in good standing and of great reputed wealth, and he testifies that the arrangement was continued as long as the company transacted business, except that the rate of interest which he was to allow was reduced from ten to eight per cent. per annum. Blank checks to draw the money in his hands were prepared by the officers of the company and were drawn on him, not as treasurer, but as a private banker; and he testified that it was never under-

stood at any meeting of the company that there were any funds of the company in his hands as treasurer, and that the funds on hand were always reported as funds in bank, and were so described in the published reports of the company.

Decided confirmations of the material parts of these statements comes from several witnesses, and it appears to the entire satisfaction of the court that the arrangement set forth in the bill of complaint was known to and approved by the stockholders as well as the directors, and by the Executive Committee and Committee of Finance and Investment. Deposits undoubtedly may be made with a banker under circumstances where the legal conclusion would be that the title to the fund deposited remained in the depositor, and in that case the banker would become the bailee of the depositor, and the latter might rightfully demand the identical money as his property; but where the deposit is general and there is no special agreement proved inconsistent with such a theory, the title to the money deposited, whatever it may be, passes to the banker, and he becomes liable for the amount as a debt which can only be discharged by the legal payment of the amount. (*Thompson* v. *Riggs*, 5 Wall., 633, 678; *Bank* v. *Wister*, 2 Pet., 318.)

"All deposits made with bankers," said Mr. Justice Miller, "may be divided into two classes, namely: those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit money peculiar to banking business, in which the depositor for his own convenience parts with the title of his money and loans it to the banker, and the latter, in the consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof on demand." (*Marine Bank* v. *Fulton Bank*, 2 Wall., 252.)

Such an agreement to refund may be express or implied, and if it is express it may be to refund with or without interest, according to the terms of agreement. Where the agreement is to pay interest the agreement is obligatory, but

the fact that the depositary agreed to pay interest affords very strong evidence that the title to the money deposited passed out of the depositor by the act of making the deposit.

"Money deposited with a banker," says Hill, "creates a legal debt between the parties, which, under proper circumstances, may be recovered in an action at law." (Hill on Trustees, 4th Am. ed., 173.)

Authorities to the same effect are numerous and decisive, as, for example, it was expressly decided by the Master of the Rolls, that money paid to a banker becomes immediately a part of his general assets, and he is merely a debtor for the amount. (*Devaynes* v. *Noble*, 1 Meriv., 561.)

"Sums which are paid," says Lord Denman, "to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker, and the party who seeks to recover the balance of such account must prove that the loan was in reality intended to be his, and that it was received as such." (*Sims* v. *Bond*, 2 Barn. & Adol., 389.)

Exactly the same rule was laid down in the Court of Exchequer, where it was held that money deposited with a banker by his customer, in the ordinary way, is money lent to the banker, with a superadded obligation that it is to be paid when demanded by a check. (*Pott* v. *Clegg*, 16 M. & W., 320.)

Viewed in the light of these suggestions, it is clear that the amount deposited by the company with the complainant, and which he still owes to the company, or to the respondent, as assignee, was and is held by him as a private banker, and not as treasurer of the company, and that any losses sustained by the complainant, at the time and in the manner alleged, for which the bankrupt corporation were and are liable as insurers, may be set off against that claim of the bankrupt corporation, as described in the pleadings in the original suit and cross-bill filed by the respondent.

Nothing remains to be done in this investigation except to recapitulate the elements for a decree, and to direct, in general terms, what the new decree in the case shall be in

the court below. Enough is already remarked to show that the complainant is entitled to the relief prayed, so far as respects the claim of the respondent for the balance due to the bankrupt corporation for the moneys deposited with him as a private banker, amounting to the sum of thirty-nine thousand one hundred and eighty-eight dollars and three cents, as appears in the record, and that he should be allowed to prove the balance due to him for the said losses, to the extent that the company is liable therefor, against the estate of the bankrupt corporation; that the complainant is not entitled to the relief prayed, so far as respects the notes referred to in the bill of complaint, for the reason that the notes were given for shares in the capital stock, and constitute a trust fund which belongs to all the creditors of the company, for which the complainant in the cross-bill is entitled to a decree.

Should further investigation become necessary in order to ascertain the exact amount of the respective claims, that investigation will be made by the Circuit Court.

The decree of the Circuit Court is reversed, and the cause remanded for such further proceedings as may be necessary, and for decree in conformity to the opinion of this court.

UNITED STATES CIRCUIT COURT—E. D. MICHIGAN.

A resolution of composition which provides for payment in the indorsed notes of the debtor, is valid and may be confirmed.
A composition will not be effective to discharge a debtor unless the amount agreed upon is actually paid.

In re JAMES T. HURST.

This was a proceeding, under the Bankrupt Act, between debtor and creditor, to compromise the former's indebtedness. A "resolution of composition" having been adopted, by which the creditors agreed "to accept the sum of twenty cents on the dollar in full satisfaction and discharge, provided the said

sum be paid as follows: six-month notes of the debtor, indorsed by, etc., as security," the District Court, on motion, made an order to record the same.

E. K. Roberts & Co., a creditor, having refused to sign the resolution, filed a petition in review of the said order, on the ground that it did not provide for payment in money.

Julian G. Dickenson, for creditor.

William Jennison, for bankrupt.

EMMONS, J.—The only error urged upon this bill of review is, that the resolution of composition provides for a payment in indorsed promissory notes, whereas the statute requires it shall be in money. Literally interpreted, it is subject to the criticism made. It does provide expressly that the payment shall be made by the delivery of certain indorsed promissory notes. If we cannot construe this to mean a payment in money, the "resolution" must be rejected. We think, without any violation of familiar rules of interpretation, we can read this language as importing such payment, notwithstanding its apparent literal meaning to the contrary. The circumstances in which these words are employed, show that the word "payment" is not to be understood in its literal, absolute signification.

Did not peculiar circumstances compel us to put in accessible form the reasons for our ruling, we should not, pressed as we are with other duties, feel obliged to do so. We are informed, however, the legality and the effect of these proceedings are questioned in other tribunals; and we assume that the construction which we give them here will be adopted there. In the midst of jury trials, acting also for the district judge, to dispose of a long list of certified admiralty cases, as well as those upon appeal, and the whole business of the Bankruptcy Court, it is impossible for us to do more than simply link together what is mere memoranda from which our oral judgment was delivered. The few moments we can spare from three sittings a day, will not enable us to condense these suggestions or avoid considerable repetition.

What little we have done could by no possibility have been accomplished, had we not received some very exceptional and very efficient aid from the learned counsel of the bankrupt.

Had the resolution come before us in different circumstances, and where, without great injury, we could have caused another to be adopted in its stead, we should have preferred its rejection on account of the impolicy of sanctioning doubtful terms when it is so easy to comply with the provisions of the law. Litigation is naturally created by such ambiguities, and has actually resulted from them in the present instance. It is with great reluctance that we sustain the practice in this case, notwithstanding the many precedents found in the books for construing similar words as we now interpret these. We have much reason to believe that had this point been argued before the District Court, the proceedings would have been remitted to the creditors, and a new resolution required. We hesitated, indeed, whether, owing to the practice of that court, we would listen to the objection at all.

We deem it unnecessary to discuss the doctrines, much less cite adjudications in reference to the interpretation of statutes and contracts generally, where the decisions are so numerous in reference to the very words employed in this resolution, and the subject-matter in which it deals. They are but illustrations of the familiar general rule on which they rest, that every instrument must be construed to effectuate the presumed intention of the parties. It is so in deeds, wills, personal covenants, and even judgments and statutes. In reference to them all, the same language, in numerous instances, has been held to bear wholly different meanings, according to the circumstances in which it is employed. The bearing upon this subject is so full and so familiar, that its citation and discussion would be quite out of place. We shall do no more than refer to a very small portion of the very great number of English and American judgments which have declared that the words "payment," "in satisfaction of," "in full discharge of," and numerous other similar expressions,

when contained in receipts and other instruments in reference to antecedent and liquidated obligations, operate to discharge them, or the contrary, just as the circumstances in which they are used indicate intention, and as justice demands. The receipt of a promissory note in payment of an antecedent debt, when a suit is brought by the creditor against his debtor, in all of the States of the Union where they profess to follow the common law, is held not to discharge the original obligation. This result is declared in various forms of expression. It is sometimes said to be a conditional payment; at others, that the word payment is not to be understood in its technical sense, but is intended only to evidence the amount to be paid. In those States where a different rule is established, they concede it to be peculiar. If the same receipt is given in circumstances where it is quite clear that the parties intended to satisfy absolutely an antecedent debt, as where financial adjustments demand that a mortgage should be discharged, a judgment satisfied, a retiring partner who leaves the assets of a firm in the hands of his previous associates released, and numerous other instances where the nature of the transaction shows that actual satisfaction was intended; in all such instances, these words "in payment of," or "in satisfaction of," will be ruled to import what they literally mean. In the construction which we give this resolution, holding as we do that it does not mean the delivery of the promissory notes as payment and a discharge of the debtor, we do not approbate the extreme expressions in several of the cases on this subject which hold, that there must be an express agreement in terms to accept a note in satisfaction before it will operate as such. It is a mere matter of interpretation in each instance, controlled by the circumstances in which the agreement is made.

1 Smith's Lead. Cas., 8th Am. ed., p. 613, cites a long list of cases, and deduces from them the general principle which the author supposes they sustain. After saying that the transfer by a debtor to his creditor of the note of a third person will discharge his obligation, if such is shown to be

his intention, and that such intention must appear by the express agreement of the parties, and will not be implied by the mere act of transfer, adds (p. 613) that "merely receipting the notes as cash, or giving a receipt in full, or receipting the notes as being in payment of the debt, will not alone be sufficient to prove that the notes were taken, not as conditional payment, but as an immediate and absolute discharge." (*McIntyre* v. *Kennedy*, 29 Pa., 448.)

The check of a third person was delivered to the plaintiff in payment of an antecedent debt. It does not appear that a written receipt was given, but the whole case proceeds on the assumption that in terms it was delivered in payment. Woodward, J., on a very full review of the English and American cases approbating the summary which we have quoted from the American edition of Smith's Leading Cases, lays down the general doctrine that there must be either an express agreement to receive in payment, or facts *aliunde* from which such an understanding is clearly to be implied. (*McLugan* v. *Bovard*, 4 Watts, 308.) A draft in this case was received "for the amount then due on the above judgment." Gibson, J., in deciding that it was not satisfaction of the judgment, on p. 315, says, "a note or bill taken in satisfaction of a precedent debt, imposes no further duty on the creditor than to use reasonable diligence in obtaining payment, or acceptance by presenting it in season, and giving notice of its dishonor to the debtor from whom it was had, if he be a party to it." (*Tobey* v. *Barber*, 5 Johns., 68.) In this case the receipt was very positive in its terms. It read "received of Barber one hundred and sixty-three dollars on account of within lease, and in full for the second and third quarters' rent." It was held to be sufficient to explain this receipt, and to show that the rent was not paid, by simply proving that it was given for the note of a third person, and that the note was dishonored. *Johnson* v. *Weed*, 9 Johns., 310, illustrates with what fullness the courts have held this question of payment to be one of mere construction, in the light of the circumstances in which the language of receipts and

other contracts have been written. It is conceded everywhere that where goods are sold and the note of a third person is cotemporaneously delivered in exchange, the presumption of law *prima facie* is that it is absolute satisfaction. In this case, however, a jury having found that the delivery of a note in payment of goods bought at the time was not intended by the parties to be absolute payment, the court refused to set aside the verdict; and see *Roget* v. *Merritt*, (2 Caines, 116); *Berry* v. *Griffin*, 10 Md., 27, it was held that a request to charge which implied as matter of law that the reception of a note in payment of a debt, was *per se* an absolute satisfaction, was erroneous. It might or might not be payment in fact, according to the conditions in which the receipt was given. *Perit* v. *Pittsfield et al.* (5 Rawle, 166) was a case where property was delivered "in payment of a debt." Although the word payment was used, looking to the nature of the transaction, it was held not to be such. Other parts of the case illustrate the liberality of the interpretation which courts will indulge in order to carry out what the parties intended.

There is a class of cases which decides that where upon dissolution of a copartnership the paper of one member is taken for the debt of a firm, the same words which would not import payment, in other circumstances are construed to do so in these. These judgments well illustrate the principle we have assumed, that no form of words will secure the same interpretation in all instances. When the motive is to discharge one of several debtors when the other assumes the control of the assets of the business, language indicating discharge and satisfaction will be interpreted so as to effectuate the presumed intention of the parties. Smith's Lead. Cas., Vol. I., 7th ed., pp. 613, 614, refers to a number of these judgments. *Van Eps* v. *Dillaye*, (6 Barb., 244) cites and approves 12 Johnson, p. 409, and other cases which hold that when the paper of one member of a firm is given in payment of a partnership debt, where the other member retires and relies upon the discharge of his obligation, it will be deemed absolute payment. It decides, nevertheless, even in such cases,

that where there are facts *aliunde* showing it was not so intended by the parties, such consequences will not follow, and the verdict of a jury, finding there was no payment, was not disturbed; and see *Harris* v. *Lindsay*, 4 Wash. C. C., 271; *Doebling* v. *Loos*, 45 Mo., 150. In an action to enforce a lien, it was urged that the account was paid by note. The receipt given was as follows: "Received of Loos thirteen hundred dollars in full of all my demands to date." It being the note of the debtor, the receipt, it was said, was not sufficient evidence to submit to the jury. Had the circumstances been different, the words might have been differently interpreted. Those before us in reference to this "resolution" are quite as strong as those in 45 Mo.; and see *Archibald* v. *Argall*, 53 Ill., 307, which held, on proper testimony, that it was a question of intention for the jury, notwithstanding the form of the papers. The following very recent judgments equally sustain the principle of the cases we have already more particularly noticed: *Lear* v. *Friedlander*, 45 Miss., 559; *Huse* v. *McDaniel*, 33 Iowa, 406; *Jewett* v. *Pleak*, 43 Ind., 368; *Matteson* v. *Ellsworth*, 33 Wis., 488.

No State has more fully applied the doctrine than Michigan. It is with much propriety that we adopt one of its rules of interpretation for this resolution, being, as it is, the language of its business men. (*Gardner* v. *Gorham*, 1 Doug., Mich., 500.) A note and mortgage were received "in payment for goods." Upon the trial, evidence tending to show it was not intended to receive them in satisfaction was excluded. In reversing the judgment for this reason the court, by Whipple, J., at page 510, after laying down the general rule in the most stringent form, says: "It is applicable alike to a case where the note of the debtor or of a third person is taken." He cites 9 Johnson, 310, and *Owenson* v. *Morse*, 7 Term R., 64. *Hotchin* v. *Secor*, 8 Mich., 494, also goes upon the ground that it is a mere interpretation of the language used by, and the conduct of the parties. *Dudgeon* v. *Haggart*, 17 Mich., 273; *Burchard* v. *Frazer*, 23 Mich., 225, announce the same principle.

The English doctrine is quite as stringent as the American. In *Kearslake* v. *Morgan*, 5 Term R., 513, a note was received "for and on account of the debt." Not being paid and the collateral circumstances failing to show an intention to discharge, it was held that an action could be maintained for the original consideration. This case is cited in *Sard* v. *Rhodes*, 1 M. & W., 152, with approval, and distinguished from the facts before the court, where it appeared by plea that the note was received in absolute satisfaction. *Griffith* v. *Grogan*, 12 Cal., 317, approves the general principle that a promissory note of a third person is not payment unless so expressly agreed, and says such is the English law, citing the earlier cases on that subject.

The Federal cases are equally full to the same point. (*Maze* v. *Miller*, 1 Wash., C. C., 328.) A receipt was given "in full for property sold." Upon proof that payment was made by note of a third person, which was unavailable, it was held the receipt was no bar to an action. The language of the instrument was quite as strong as that before us. See also *Harris* v. *Lindsay*, 4 Wash., C. C., 271; *Peter* v. *Beverley*, 10 Peters, 532, 558, 567. An executor gave his note for a debt due from the estate. In deciding it was no payment, Thompson, J., says, "that in no case is the giving of the note of a third person, for pre-existing debt, payment, unless it is expressly so agreed, or is clearly to be inferred from the facts of the transaction." He cites, with approbation, *Glenn* v. *Smith*, 2 G. & J., 493; 7 H. & J., 92, in which written receipts, declaring the paper was received in payment, were construed to be conditional payment only.

Glenn v. *Smith* is one of the leading cases; and, perhaps, is as fully argued as any in the books. The question was, whether certain indorsed notes constituted payment for the property in question. The receipt given was "for two promissory notes, signed by herself, and indorsed by Glenn & Co., in payment of the above account." After a very full review of the English and American adjudications down to the day of the judgment, it was held that the word "payment" would

be interpreted to mean conditional payment only. The peculiar facts of the case are relied upon to sustain this reading of the instrument.

See also *Gorgon* v. *Price*, 33 N. C., 385; Barque Chusan, 2 Story, 465, 467, in deciding that the giving of a note was not to be considered as a satisfaction of the cause of action, says, such is the law of New York, that of England, and, so far as he (Justice Story) was informed, of every State in the Union, Massachusetts and Maine excepted. See also 2 Cliff., C. C., page 4. The Kimball, same case on error, 3 Wall., 44; *Baker* v. *Draper*, 1 Cliff., 420; and *Downey* v. *Hicks*, 14 How., 240.

In view of the many precedents for construing the words of this resolution in conformity with the requirements of the statute, and holding that they do import a payment in money, we feel confident it is our duty to do so. It is part of a statutory proceeding in which any other meaning is unlawful. If it does not mean this, it is not within the statute at all. It prohibits any other payment but one in money. Predicaments are presented in which that canon of construction is applicable when the instrument is to be saved, if by any possible interpretation it can be. To use the language of another judgment, "it is our duty to approach the lines where interpretation ends, and interpolation commences."

There is no danger to creditors resulting from such a construction. The composition will not be effective to discharge the debtor, unless the amount agreed upon is actually paid. (*In re* Reiman *v.* Freidlander, 13 N. B. R., 123; *In re* Hatton, L. R., 7 Ch. App., 723; *Edwards* v. *Coombe*, L. R., 7 Com. Pleas, 519); and the numerous American and English adjudications which hold that, in all similar cases, deeds of composition, and accord and satisfaction, must be completely executed in order to be operative.

The order of the District Court to record the "resolution" is affirmed, without costs to either party as against the other.

UNITED STATES CIRCUIT COURT—S. D. OHIO.

The examination of a witness before an examining court, where the witness has since died, is competent evidence in a trial upon indictment of the party for the same offense.

The statements of a party charged with absconding, made on his way from the place of his residence, as to his intention of returning, is competent evidence to disprove the charge.

Under an indictment based upon the ninth clause of the 44th Section of the Bankrupt Law, Revised Statutes, Section 5132, charging the defendant with obtaining goods under the false pretense of carrying on business, and dealing in the ordinary course of trade, it must be shown that the defendant represented to the person from whom the goods were obtained, that he was so carrying on business, that the person was induced to part with his goods by reason of such representation, and that he was not so carrying on business. But this representation may be by acts and conduct as well as by words.

Under the tenth clause of this Section, it must be shown that the intent to defraud existed in the mind of the bankrupt against his creditors generally, and not against this particular creditor from whom the goods were obtained.

The rule as to the measure and character of proof in criminal cases.

UNITED STATES v. *S. M. PENN.*

INDICTMENT for obtaining and disposing of goods in violation of the provisions of the Bankrupt Law.

The first count in the indictment in this case, alleges that on the 17th day of October, in the year A. D. 1873, Robert B. Smart commenced a proceeding in bankruptcy against the defendant, Samuel M. Penn, late of the County of Ross, in the State of Ohio, by filing in the District Court of the United States, within the Southern District of Ohio, a petition, duly verified, and recites the allegations of the petition, giving jurisdiction to said court, and the act of bankruptcy, charged in said petition, to wit: That on the 10th day of September, A. D. 1873, the defendant departed out of and from the State of Ohio, with intent to defraud his creditors, and that on the 28th day of October, A. D. 1873, the defendant was adjudged by said court a bankrupt: And charges that the defendant, within three months next, before the commencement of proceedings in bankruptcy against him, did unlawfully, willfully, and fraudulently, obtain on credit, from Meyers, Thieman & Co., certain goods and chattels, to wit: Two

trunks of notions, white goods, hosiery, gloves, and ribbons, of the value of three hundred dollars, under color and pretense of carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade, which said color and pretense was false, and which goods and chattels were not obtained as aforesaid, for the purpose of carrying on business as a merchant, and dealing in the ordinary course of trade; he, the defendant, then and there, well knowing that the said color and pretense was false.

The second count charges that the defendant, within three months next, before the commencement of proceedings in bankruptcy against him, to wit: On the 17th day of September, A. D. 1873, did unlawfully, knowingly, and with intent to defraud his creditors, dispose of to one Mrs. Estelle, certain of his goods and chattels, to wit: Two trunks of notions, white goods, hosiery, gloves, and ribbons, of the value of three hundred dollars, otherwise than by *bona fide* transactions in the ordinary course of his trade, which had been obtained by him on credit from Meyers, Thieman & Co., and remained unpaid for.

The third count charges that the defendant within three months next before the commencement of proceedings in bankruptcy against him, to wit: On the 17th day of September, A. D. 1873, did unlawfully, willfully, and fraudulently, obtain on credit, from John Shillito and Company, certain goods and chattels, to wit: One package of embroidery and laces, of the value of one hundred and fifty dollars, under color and pretense of carrying on business as a merchant and dealer in the ordinary course of trade, which said color and pretense was false, and which goods were not obtained for the purpose of carrying on business as a merchant, and dealing in the ordinary course of trade; the defendant well knowing that the said color and pretense was false, and intending there and then to defraud the said John Shillito and Company.

The fourth count sets out in full the proceedings in bankruptcy, and charges the defendant with obtaining goods of John Shillito and Company, as in the third count charged.

This prosecution is brought under the 5132d Section of the Revised Statutes of the United States. The first, third, and fourth counts in the indictment are based upon the ninth clause of the section, and which provides, "That every person, who within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit, from any person, any goods or chattels with intent to defraud," shall be punished by imprisonment, with or without hard labor, for not more than three years.

The second is based upon the tenth clause of the section, which provides: Or within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith, in the ordinary course of trade, any of his goods or chattels, which have been obtained on credit, and remain unpaid for, shall be punishable by imprisonment, with or without hard labor for not more than three years.

During the progress of the trial, counsel for the Government, after having shown that there had been an examination of the defendant before a United States Commissioner, upon the charge contained in the indictment, that upon that examination one Williams was sworn and examined as a witness on behalf of the Government, and was cross-examined by counsel for the defendant, and that said Williams was dead. Offered in evidence the examination of said witness on said examination. To the admission of this evidence, counsel for the defendant objected, for the reason that the examination before the Commissioner was not a suit, and that the issue was not the same.

Held, by the court: The examination by the Commissioner, was such a judicial proceeding as would come within the rule, admitting such evidence, and the charge in one of the counts being the same as was the issue in the examination before the Commissioner, to that extent that it was the same issue,

and the general rule being that where a witness already examined in a judicial proceeding, between the same parties, involving the same issue, has since died, his former examination is admissible. Starkies Ev., 51; Greenleaf's Ev., 1 Vol. 193; Taylor's Ev., 436, 440; *United States* v. *Macomb*, 5 McLean, 286; *Wagers* v. *Dickey*, 17 Ohio, 439; *Hoover* v. *Jennings*, 11 Ohio St., 624.

The objection will, therefore, be overruled and the testimony admitted.

The counsel for the Government introduced further evidence tending to prove that the defendant had absconded and left the State with the intention of remaining absent therefrom. The counsel for the defendant then offered to prove by a witness, what the defendant, while on his journey from the State, stated his intentions were in regard to returning, to which the counsel for the Government objected.

By the court: The rule of law is, "That if a person changes his domicile or actual residence, or is upon a journey, or leaves his home, or returns thither, or remains, or secretes himself, or, in fine, does any other act, material to be understood, his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as verbal acts; indicating a present purpose and intention, and are, therefore, admitted in proof, like any other material facts; so upon an inquiry as to the state of mind, sentiments, or opinions of a person at any particular period, his contemporaneous declarations are admissible as part of the *res gestæ*." "And so extensive is the rule in its operation, that to a certain degree it overrules the rule which precludes a party's declarations from being evidence for himself." (Taylor's Ev., 1 Vol., 521, 529; Starkies' Ev., 87, 467; Greenleaf's Ev., Vol. 1, Section 108; *Thornkyke* v. *City of Boston*, 42 Mass., 242; *Lund* v. *Inhabitants of Tyngsborough*, 63 Mass., 37; *Gorham* v. *Canton*, 5 Me., 265.) The objection will therefore be overruled, and the testimony admitted.

Hon. W. M. Bateman and *Richards*, for the Government.

Messrs. Job Stephenson and *R. A. Johnston*, for defendant.

SWING, J.—The offense created by the ninth clause of this section, and which is charged in the first, third, and fourth counts of the indictment, is composed of the following elements:

First. That proceedings in bankruptcy were commenced against the defendant.

Second. That he obtained on credit from the parties named in the indictment the goods therein described.

Third. That he obtained them within three months before the commencement of the proceedings in bankruptcy.

Fourth. That he obtained them under the color and pretense of carrying on business, and dealing in the ordinary course of trade.

Fifth. That such color and pretense were false.

Sixth. That he obtained them with intent to defraud.

Each one of which must be established by the evidence in the case before the jury will be justified in returning a verdict of guilty. There is no material controversy in regard to the existence of the first three facts, to wit: The commencement of the proceedings in bankruptcy; the obtaining on credit from the parties the goods; and that it was within three months before the proceedings in bankruptcy. But the last three are the principal facts contested.

If you find from the evidence that proceedings in bankruptcy were properly commenced against the defendant, that he obtained on credit from the parties the goods described, and that it was within three months before the commencement of the proceedings in bankruptcy, you will then inquire whether he obtained them under the color and pretense of carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade?

In order to establish this fact, it must be shown by the evidence that the defendant pretended to the parties that he was carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade. This pretense may, however, have been by conduct as well as by words (2 Wharton's Crim. Law, 2097, 2113; Rup. on Crimes, 2 Vol., 292,

297; *Regina* v. *Boyd*, 5 Cox's Crim. Cases, 502; *United States* v. *Prescott*, 4 N. B. R., 112); but the evidence must nevertheless establish its existence.

And the evidence must further show that parties in consequence of this pretense were induced to part with their goods. And that this pretense was false, that is, that he was not in fact carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade. It will be remarked that the statute is not against obtaining goods under all false colors and pretenses, but against the single one, that of carrying on business and dealing in the ordinary course of trade. (*Regina* v. *Boyd*, 5 Cox Crim. Cases, 502; *United States* v. *Prescott*, 4 N. B. R., 112.)

If you find from the evidence that he made the pretense —that he was carrying on business as a merchant at Bainbridge, dealing in the ordinary course of trade—that the parties in consequence of this representation and pretense parted with their goods, and that in fact he was not carrying on business as a merchant at Bainbridge, dealing in the ordinary course of trade, then you will inquire whether the defendant obtained such goods with intent to defraud. This is an important element in the offense, and its existence must be established by the evidence in the case. This, however, may be established by facts and circumstances.

If, therefore, you find that the proceedings in bankruptcy were commenced against the defendant, that he obtained upon credit from the parties the goods described in the indictment—within three months before the commencement of said proceedings, that he represented to them that he was carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade—and that the parties, by reason of such representation, parted with the goods, and that he was not in fact carrying on business as a merchant at Bainbridge, and dealing in the ordinary course of trade—and that he obtained the goods with the intent to defraud, the defendant would be guilty under the first count of the indictment, if the goods were obtained from Meyers, Thieman & Co., and

under the third and fourth counts if the goods were obtained from Shillito & Co.

The offense created by the tenth clause of this section, and which is charged in the second count in the indictment, is composed of the following elements:

First. That proceedings in bankruptcy were commenced against the defendant.

Second. That he sold the goods therein described.

Third. That he sold them within three months next before the commencement of the proceedings in bankruptcy.

Fourth. That the goods were obtained on credit, and unpaid for.

Fifth. That the sale was not made in good faith, in the ordinary way of trade.

Sixth. That the sale was made with the intent to defraud his creditors.

The first three elements constituting the offense under this clause, are the same as the first three elements constituting the offense under the ninth clause of the section, except in that, the goods were obtained and in this they were sold, and it may be said of these as well as of the fourth element necessary to constitute the offense under this clause, that their existence is not seriously controverted.

If you, therefore, find from the evidence in the case; that proceedings in bankruptcy were commenced against the defendant; that he sold the goods described; that he sold them within three months next before the commencement of the proceedings in bankruptcy, and that the goods were obtained on credit and unpaid for, you will then inquire whether the sale was made in bad faith and out of the ordinary way of his trade? This also may be established by facts and circumstances. If you find that the sale was made in bad faith, and out of the ordinary way of his trade, you will then inquire whether the sale was made with intent to defraud his creditors. This, too, may be established by circumstances, but it must be shown to the satisfaction of the jury by them that the intent existed in the mind of the defendant at the time

the sale was made. A question is made whether this intent must exist against the particular creditor from whom the goods were purchased or against his creditors in general? I think it clear that it must have existed against his creditors in general, and not against the particular creditor from whom the goods were purchased. (*United States* v. *Clark*, 4 N. B. R., 59.) If, therefore, you find from the evidence, that proceedings in bankruptcy were commenced against the defendant, that he sold the goods described, that the sale was within three months next before the commencement of the proceedings in bankruptcy, that the goods were obtained on credit and unpaid for, that the sale was made in bad faith out of the ordinary course of his trade, and that the sale was made with the intent to defraud his creditors, the defendant would be guilty under the second count in the indictment.

The legal presumption is that the defendant is innocent of the crime charged, and so strong is this presumption that it can only be overcome by evidence which establishes his guilt beyond a reasonable doubt; in civil cases the preponderance of evidence will justify a verdict, but it is not so in criminal cases, for no preponderance of evidence which falls short of removing from the minds of the jury every reasonable doubt of the guilt of the accused, will justify a verdict of guilty.

In a criminal case, it is competent for the accused to put in evidence his former good character in relation to the particular crime with which he stands charged. Thus, in the present case, the character of the defemdant for integrity and honesty as a merchant, is evidence to be considered by the jury upon the question of his guilt, for the reason "That it may not be probable that a man who has sustained a uniform good character for integrity and honesty will forfeit it by the commission of a fraudulent and dishonest act."

If, therefore, the evidence satisfies your minds beyond a reasonable doubt of the guilt of the defendant, your verdict will be guilty, but if it does not so satisfy your minds it will be, not guilty.

Verdict of not guilty.

UNITED STATES SUPREME COURT.

The several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts.

The Circuit Courts have concurrent jurisdiction with the District Courts over suits brought by an assignee appointed in another district.

A general denial of fraud in an answer is equivalent to nothing more than a denial of a conclusion of law.

If a creditor advances money to pay a valid execution, and then takes a judgment for the advance and his own debt, an execution thereon will be good as to the advance, but void as to the rest.

WILLIAM W. LATHROP, Assignee in Bankruptcy of JAMES W. ADAMS, Appellant, v. *SAMUEL DRAKE and JOHN DRAKE, Jr., Executors of JOHN DRAKE, deceased, WINFIELD S. HULICK, Administrator, DERRICK HULICK, deceased, and SAMUEL DRAKE, now or late doing business as DRAKE, HULICK & CO.*

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRADLEY, J.—The question in this case is whether, under the Bankrupt Act as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a Circuit Court of the United States in any district other than that in which the decree of bankruptcy was made? If not, whether the Amendatory Act of 1874 (18 Stat., 178, Section 3) validated such a suit already commenced.

The jurisdiction of the Circuit Courts in cases of bankruptcy, as conferred by the Act of 1867, was two-fold, original and appellate; the latter being exercised in two different modes, by petition of review, and by appeal or writ of error. But the enacting clauses which confer this jurisdiction, make such direct reference to the jurisdiction of the District Courts, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in

bankruptcy initiated by the petition and ending in the distribution of assets among the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the District Courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified, resulting, however, in the two general classes before mentioned. Were it not for the words "in their respective districts," the jurisdiction would extend to matters of bankruptcy arising anywhere, without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. The jurisdiction is confined to their respective districts, it is true, but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court, within its own district, may exercise the powers conferred, but those powers extend to all matters of bankruptcy without limitation. There are, it is true, limitations elsewhere in the act, but they effect only the matters to which they relate. Thus, by Section 11, the petition in bankruptcy, and by consequence the proceedings thereon, must be addressed to the judge of the judicial district in which the debtor has resided or carried on business for the six months next preceding; and the District Court of that district being entitled to and having acquired jurisdiction of the particular case, necessarily has such jurisdiction exclusive of all other District Courts, so far as the proceedings in bankruptcy are concerned. But the exclusion of other District Courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of, or connected with, that identical bankruptcy,

so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to, and in aid of, the proceedings in bankruptcy, may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of the assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases, would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of States, in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Sherman* v. *Bingham*, 7 N. B. R., 490; and we concur in the opinion there expressed, that the several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts in cases of bankruptcy.

Turning now to the jurisdiction of the Circuit Courts, we find it enacted in Section 2 in the Act of 1867, first, that the Circuit Courts within and for the districts where the proceedings in bankruptcy are pending, shall have a general superintendence and jurisdiction of all cases and questions arising under the Act. This is the revisory jurisdiction above referred to, exercised upon petition or bill of review. Secondly, "said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee,

touching any property or rights of property of said bankrupt transferable to or vested in such assignee." The Act of 1874 changes the words "the same district" to "any district," and adds to "person claiming an adverse interest" the words "or owing any debt to such bankrupt." These changes make the jurisdiction of the Circuit Court for the future clear and undoubted in cases like the present. But we are endeavoring to ascertain what jurisdiction was conferred by the act as originally passed. Reverting to the language used in the second clause, above cited, it seems to be express and unqualified, that the Circuit Court shall have concurrent jurisdiction with the District Courts of the same district. If, therefore, the District Court has jurisdiction of suits brought by an assignee appointed in another district, the Circuit Court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion unless the phrase "the same district" is made to refer back to the beginning of the section, where mention is made of Circuit Courts within and for the districts where the proceedings in bankruptcy are pending. But the words "the same district" used in the second clause, refer more naturally to the district in and for which the Circuit Court is held. The phrase "the Circuit Courts shall have concurrent jurisdiction with the District Courts of the same district" is by itself so clear and unambiguous that a doubt could not have been raised as to its meaning had it not been embraced in the same section with the other clause. And it is in accord with the general intent of the act to invest the Circuit Court with jurisdiction co-extensive with that of the District Court, except that it is only revisory in reference to the proceedings in bankruptcy.

If jurisdiction was conferred (as we have seen it was) on the various District Courts, to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should not have been conferred on the various Circuit Courts; but, on the contrary, very cogent reasons why it should have been. Important

cases would be very likely to arise, both in amount and the questions involved, which it would be desirable to bring directly before the Circuit Court, in order, if necessary, that an early adjudication might be had in the court of last resort.

As, therefore, the reason for such a provision, the general intent of the act, and the words themselves, all coincide, we do not hesitate to say that the Circuit Court had jurisdiction of suits at law and in equity under the original act, co-extensive with the District Courts, unless the qualifying words at the end of the clause, confining the jurisdiction to cases "touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee," may be deemed a restriction. In this case, however, the suit does concern and have reference to property transferable to the assignee. It is brought to compel the defendants to restore to the bankrupt's estate the value of property sold by them under a judgment alleged to have been confessed in fraud of the Bankrupt Act, and within four months of the commencement of proceedings in bankruptcy.

The amendatory act of 1874 has but little bearing upon the construction of the original act in the particular involved in this case. Different views had been expressed in relation to its meaning and the jurisdiction of the courts under it. The amendatory act removed any ambiguity that may have existed; but did not thereby impress a more restricted meaning upon the language of the original act than was due to it by a fair judicial construction.

As to the merits of the case, it is almost too plain for argument. The general denial of fraud in the answer of the defendants is equivalent to nothing more than a denial of a conclusion of law. The allegation that they were led to believe, by the letters and representations of the bankrupt, that he was solvent at the time of the confession of judgment, and was worth seven thousand dollars over and above his indebtedness, has but little force. If this were true, why did they immediately levy on and sell his whole stock of goods? That sale produced but little more than half the

amount of their judgment. These unquestioned facts are sufficiently significant, and the evidence of the bankrupt makes the case a very strong one for the complainant. He had executions against him and wrote to the defendants that he was in trouble, and requested them to come to his aid. They refused to do anything unless he would confess judgment for the amount due them, including the amount of the prior judgments. They then immediately levied on all his goods and sold him out. It was a clear case of preference by a debtor in insolvent circumstances, and known to be such by the judgment creditor.

The prior executions, one in favor of A. Coran & Co. for about six hundred dollars, and the other in favor of Henry Bloss for about nine hundred dollars, were probably valid. If the appellees satisfied those executions, or advanced the money for that purpose, the amount being embraced in their judgment, their own execution was good to that extent, and they should have credit therefor. As to the rest, they were answerable for the value of the goods levied on and sold.

The decree of the Circuit Court must be reversed and the record remitted with directions to enter a decree in favor of the complainant below for the value of the goods of the bankrupt sold on the defendants' execution, with interest from the time that the same was demanded of them by the assignee, less the amonnt to which they may be justly entitled for advances to satisfy the said executions of A. Coran & Co. and Henry Bloss.

UNITED STATES DISTRICT COURT—E. D. NORTH CAROLINA.

Notice of creditors' appearance in opposition to discharge, addressed to the Register, bearing date on the day of hearing of the petition for discharges was filed with the clerk of the court, at a General Term thereof, more than a year thereafter, and was never filed with the Register.

Creditors' specification of grounds of opposition to discharge was filed with the Register on the day after the final hearing.

In re Buxbaum.

Held, That the specifications were not filed in accordance with the provisions of law, and could not be considered. The discharge granted.

In re JOSEPH BUXBAUM.

BROOKS, J.—The question presented by the certificate of Mr. Register Shaffer is, were the specifications of objections to the discharge of the bankrupt properly filed, so that they may be considered by the court?

It appears that the meeting of creditors to show cause against the bankrupt's discharge was duly ordered upon his petition, the required notice and publication made, and the meeting held accordingly, whereat no notice was given by any creditor, of a purpose to oppose the discharge. The final oath was administered to the bankrupt, and the meeting adjourned *sine die*.

A paper now appears, purporting to be a notice of opposition to the bankrupt's discharge, dated 27th July, 1869, the day on which the meeting was held, signed by the solicitors of certain creditors. Upon this paper the clerk indorses "Filed at Salisbury, August Term, 1870," and the Register certifies "This paper I have never seen before this 1st day of December, 1875."

It further appears that the specifications of objection were filed with the Register, August 5th, 1869, nine days after the final meeting was held, and adjourned without day.

Specifications of grounds of opposition to discharge may be properly filed with the clerk within the ten days allowed by the rule, or the further time which may be allowed by the order of the court, but notice of the intention of the creditor, or of the assignee to oppose the discharge must be made known to the Register at the final meeting. Then it becomes the duty of the Register to adjourn the case into the District Court for further proceedings, but whenever filed, they can only be considered, and issues of law or facts arising thereon tried, when filed at the meeting to show cause, or pursuant to notice of opposition then and there given.

The specifications in this case were not filed in accord-

ance with any provision of the law. They cannot be considered, and the bankrupt is therefore entitled to his discharge.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Inability to secure the consent of a majority in number and value of the creditors to a discharge, is no sufficient excuse for delay in applying therefor, when the time limited for making such application had elapsed before the adoption of the amendment reducing the number required to consent to a discharge.

In re LOWENSTEIN.

DILLON, C. J.—Lowenstein, who applied for a discharge in bankruptcy, was, on his own petition, adjudicated a bankrupt, April 26, 1872. Debts were proved against his estate, but no assets ever came to the hands of the assignee. His application for a discharge was not made until September 23, 1874. The only reason given for the delay in making the application for the discharge is that the bankrupt has never been able, although he has diligently tried to do so, to procure the assent in writing of a majority in number and value of his creditors, as was required by the law existing up to June 22, 1874.

On the hearing in the United States District Court, November 30, 1874, the bankrupt filed the written assent of more than one-fourth in number and one-third in value of the creditors who had proved their claims upon which he was liable as principal debtor, contracted since January 1, 1869. The discharge was opposed by the creditors, and the petition of the bankrupt therefor was denied by the District Court, when Judge Treat was sitting, solely on the ground that it was made too late. From the order dismissing the petition for discharge the defendant appealed.

Here no assets came to the hands of the assignee, and in such cases the provision of the Bankrupt Act (Section 29) is, that the bankrupt may apply for his discharge "at any time

after the expiration of sixty days from the adjudication of bankruptcy, and within one year from such adjudication." Where there are assets and debts proved, the application cannot be made until after six months, and in such cases there is no provision limiting the application to one year, or any other specified time.

Admitting that, in cases like the present, the delay to apply within the year may be excused (*In re* Donaldson, 11 N. B. R., 460; 2 Dil., 346; *In re* Cannaday, 3 N. B. R., 1; 2 Biss., 75; *In re* Vorbeck, 1 Pac. L. R., 100; *In re* Pierson, 10 N. B. R., 107), still the excuse here offered is no excuse whatever. The year expired April 26, 1873. The petition for a discharge was not filed until September, 1874. The bankrupt says he did not apply before the Act of June 22 went into effect, because a majority of his creditors would not consent to his discharge. This did not prevent filing his petition within the year.

The law reducing the number of creditors whose assent was required, did not pass until January 22, 1874, more than a year after the latest time when the petition should have been filed. Section 9 of this act does apply to ordinary cases open and pending when it took effect. (*In re* King, 10 N. B. R., 566; *In re* Griffiths, 10 N. B. R., 456), and if the only obstacle to the the discharge here sought was the non-assent of a majority of the creditors, as previously required, the bankrupt would—it may be admitted—be entitled to his discharge on complying with the easier requirements in this regard of the Amendatory Act. But the other obstacle in the way of his discharge is the limitation of time contained in Section 29, and this limitation remains in full force, unaffected by the 9th Section of the Amendatory Act of June 22, 1874, which does not undertake to repeal or modify it.

Affirmed.

COURT OF COMMON PLEAS—FRANKLIN COUNTY, PENN.

Whether an assignment in proceedings under a State Insolvent Law is void, is a question that may be raised in a collateral action.

A State law providing for the distribution of the assets of an insolvent bank is superseded by the Bankrupt Law.

An assignment made as a part of the machinery of a State Insolvent Law, and deriving all its validity and efficacy from the statute, is void.

An assignment for the benefit of creditors which gives priority to certain creditors, is not void, except as against the assignee in bankruptcy.

SHRYOCK and RHODES, Assignees, etc., v. *BASHORE.*

This was a suit by the assignees of a State bank against the defendant, the maker of a promissory note held by the bank. The jury returned a special verdict, showing that after the maturity of the note proceedings were taken against the bank, on account of its insolvency, under the Act of 1850, a decree was obtained against the bank, and in pursuance thereof it made an assignment to plaintiff. Just prior to its insolvency it drew a draft in favor of the cashier of the First National Bank on the Union Banking Company of Philadelphia, which was protested for non-payment and returned to the First National Bank; the latter bank, after the deed of assignment to the plaintiffs had been made and recorded, transferred the said draft to the defendant, who had knowledge of the insolvency of the bank and the assignment to the plaintiffs; the defendant, before suit was brought against him, tendered to the plaintiffs in payment of his note the said draft of the Farmers' and Mechanics' Bank, which plaintiffs refused to accept in payment of his note, and then brought suit.

Messrs. Brewer & Gehr, and *Kimmell*, for plaintiffs.

Messrs. Kennedy & Stewart, for the defendant.

ROWE, P. J.—On the facts found by the jury are the issues proved for the plaintiffs? There are two issues: one raised by the plea of set-off, the other by the plea which alleges that the assignment by the bank to the plaintiffs was void by operation of the Bankrupt Law of the United States.

Since we are of opinion that the issue on the plea of set-off is proved for the defendant, we might avoid a decision of the other far more difficult question. But both parties to this suit are anxious to have a decision on this point, and the assignees are specially entitled to have it, that they may know their situation with respect to this trust, before they render themselves liable to loss by distributing the funds in their hands. They will not know it with certainty until the opinion of the Supreme Court shall have been obtained, which is the end in view, but meantime they and the numerous creditors of the bank are entitled to know the reasons which influence this court.

If the assignment of the property and effects of the bank to the plaintiffs was void, they have no legal claim to this note in suit, and no right to recover upon it. If the assignment was void, it was either because the law under which it was made was suspended by the passage of the National Bankrupt Law, or because the deed itself was absolutely void as to all persons, for the reason that it contravenes the provisions or the policy of the Bankrupt Law.

These questions arising on the Bankrupt Law seem to be in the case. The same questions were raised in the same way in *Griswold* v. *Pratt*, 50 Mass., 16, and *Maltbie* v. *Hotchkiss*, 5 N. B. R., 485; 38 Conn. 80. If they can only arise in a direct proceeding, as for instance, by the petition of a creditor of the bank to the Court of Common Pleas of Cumberland County, to vacate the orders, dismiss the citation, and direct a re-assignment and re-delivery of the assets in the hands of the plaintiffs to the bank, then they were not properly for decision in many of the cases in the State courts hereafter cited; in no others, perhaps, except *In re* Gideon Reynolds, 9 N. B. R., 50; 8 R. I., 485, and *Van Nostrand* v. *Carr*, 2 N. B. R., 485; 30 Md., 128. No doubt a direct proceeding would be the preferable way of raising these questions, if the purpose be simply to ascertain what functions the assignees have under their appointment; for some they doubtless have, since a few sections only of the

"Act regulating banks" can be supposed to be obnoxious to the provisions of the Bankrupt Law, and the court would then determine whether the law is suspended, and to what extent, and what parts remain in force.

Whether and how far a State statute may exist and operate side by side with a law of Congress on the same subject, is a great and difficult question, which was considered by the Supreme Court of the United States in *Sturges* v. *Crowninshield*, 4 Wheat., 122, 193; *Houston* v. *Moore*, 5 Wheat., 1. The course of the arguments, and the conclusions reached, may be seen in Kent's Commentaries, Vol. II., pp. 387–391. It is sufficient for us to state the point decided in the first-named case in the language of the certificate. A State has authority to pass a Bankrupt Law * * * provided there be no Act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law.

Mr. Justice Catron says, as quoted *In re* Gideon Reynolds, *supra*, "I deem every State law a Bankrupt Law, in substance and fact, that causes to be distributed, by a tribunal, the property of a debtor among his creditors."

First of all, then, we must compare the Bankrupt Law with the Act of Assembly of April 16, 1850, entitled "An Act regulating banks." We have to do with certain portions of the statute only, namely, Sections 25 to 29, and 38, 39, Purdon, 144, 148, pl. 99, *et seq.*

These sections provide, in substance, that if a bank shall neglect or refuse to pay on demand, in gold and silver, any note, bill, or obligation issued by such bank, or any moneys received in said bank on deposit, it shall be the duty of the president or cashier to make, at the time, an indorsement on the note of the day and the year when the payment thereof was demanded, and subscribe his name thereto. (Section 25.)

Upon application to the court on oath, setting forth the presentation of such note, obligation, or certificate of deposit, and demand of payment and the refusal or failure to pay, it is made the duty of the court to direct a citation to the finan-

cial officer of the bank, commanding him to appear at a time and place designated. Upon hearing, if the court is satisfied of the truth of the complaint, and that the provisions of the 25th Section (above given) have been wilfully violated, "then the directors of the bank shall make and execute, under their corporate seal, a general assignment of all the estate, real and personal, of the bank, to such persons as they may select, subject to the approval of the court;" and it shall be recorded within thirty days. (Section 27.)

If necessary, an attachment may issue to seize the banking-house, books, moneys, effects, etc., and to deliver the same to the trustees; and if the directors do not, within ten days thereafter, make an assignment, the trustees shall, by operation of law, be vested with the same rights and powers as if such assignment had been make. (Section 28.)

The assignees shall be sworn and give security. They shall proceed to sell all the real and personal estate of said bank, and collect all the outstanding debts, and for this purpose may use the corporate name of the bank. *Provided*, however, that the said assignees shall receive in payment of debts due to said bank, its own notes and obligations, and the checks of its depositors at par (whether held by the debtor at the time of the assignment, or acquired afterward). *Bank* v. *Spangler*, 32 Pa. St., 474).

The assignees shall once in every six months file an account of their receipts and disbursements, and once in every six months make a *pro rata* dividend of the balance in their hands. (Section 27.)

The assignees shall pay out of the assets and property of the said bank, in case of an assignment, the debts and liabilities in the following order: 1. Noteholders; 2. Depositors; 3. All other creditors except stockholders, who shall be last paid. (Section 39. See Penna. Bank Assign. Acct., 39 Pa. St., 103.)

The assignees shall be subject, except as herein otherwise provided, to the several provisions of the Act of Assembly of June 14, 1836, an act relating to assignees for the benefit of

creditors, etc. The corporate power of the bank, after the making of the assignment, shall cease and determine except so far, etc. (Section 27.)

The salient points are, that an insolvent bank which has stopped payment, or failed to pay a depositor on demand, may be compelled, by proceedings before a tribunal, to assign all its property for distribution among all its creditors, not *pro rata*, but according to a prescribed order of priority and preference; and that the assignees must receive the notes and obligations of the bank, and the checks of its depositors, at par, in payment of its debts, even if acquired by the debtor after the assignment, and that the bank ceases to exist.

Turning to the national Bankrupt Law, Revised Statutes of United States Title Bankruptcy, without reciting any of its provisions, but referring only to Sections 5122, 5013, 5021, as amended by Act of 22d of June, 1874, Section 12, 5091 and 5073, we find that it also provides for the case of an insolvent bank which has stopped payment for forty days of its commercial paper, "or which shall fail for forty days to pay any depositor, upon demand of payment lawfully made;" or further, which shall make any payment or transfer of money, or other property, with intent to give a preference to one or more of its creditors; or with intent, by such disposition of its property, to defeat or delay the operation of this act, declaring these to be acts of bankruptcy. And by this law such bank may be compelled, by proceedings in the courts of the United States, to assign all its property for distribution among its creditors *pro rata*, without priority or preference; and no set-off can be allowed in favor of any debtor to the bank of a claim purchased by or transferred to him after the filing of the petition, or in case of compulsory bankruptcy after the Act of Bankruptcy, and with a view of making such set-off.

Now, respecting *suspension* of commercial paper, it has been held that the suspension continues although the debtor makes an assignment for creditors before the expiration of the forty days, and when the time expires, is a complete act

of bankruptcy. (*In re* P. Lamer, 9 N. B. R., 494.) And respecting *intent* to prefer a creditor or defeat the act, that where the transfer must, of necessity, work a preference or defeat the act, the intent to do so is a necessary legal deduction from the fact of the transfer; Cases Bump. on B., 8th ed., 798; and that an assignment, giving preference, is an act of bankruptcy; *ex parte* Breneman, Crabbe, 456; *Barnes* v. *Rettew*, 8 Phila., 133.

The comparison we have thus made of these laws shows that the main purpose of each is to wind up the affairs of the insolvent corporation, and to distribute its assets among its creditors. This is, indeed, the only purpose of each, for the Bankrupt Law allows no discharge to a corporation. Distribution *pro rata*, and to that end prevention of preferences, is its whole design with respect to corporations. And it may now be observed, that we need not inquire whether the State law is or is not a bankrupt law or an insolvent law, for whatever kind of law it is, the law of Congress, so far as regards corporations, is the same. But we think it is plainly a part of the insolvent laws of the State; for it compels the assignment, and the bank ceases to exist. We deduce from the comparison:

First. That the subject-matter of these sections of the State statute, and the case provided for by them, fall within the purview of the Bankrupt Law; within its scope; within the whole extent of its intention and its provisions.

Second. That these laws are antagonistic, aud differ in intentions and results, are incompatible, and cannot be applied effectually to the same thing at the same time.

Do they, then, so conflict that one suspends the other? This the decided cases must answer. They seem to arrange themselves in three classes:

First. Those which hold that the passage of the Bankrupt Law *ipso facto* suspended the State laws upon the same subject, so that they could no longer operate upon persons or cases within the purview of of the Bankrupt Act. This was the doctrine of Story *in re* Lucius Eames, 2 Story, 322; and

of Kent in Note (d) to page 390 of Vol. I. Com. ; of the Supreme Court of Massachusetts, in *Griswold* v. *Pratt*, 9 Mass., 16. The same view is held by the Supreme Court of Rhode Island *In re* Gideon Reynolds, 9 N. B. R., 50, 8 R. I., 485; by the Court of Appeals of Maryland in *Van Nostrand* v. *Carr*, 2 N. B. R., 485, 30 Md., 128; re-affirmed in *Lavender* v. *Gosnell & Tripolett*, 12 N. B. R., 282; by the Supreme Court of California in *Martin* v. *Berry*, 2 N. B. R., 629, 37 Cal., 208; by the Supreme Court of New Hampshire in *Chamberlain* v. *Perkins*, 51 N. H., 336. All these are decisions on the precise question. To these may be added in Pennsylvania: *Commonwealth* v. *O'Hara*, 6 Phila., 402, 1 N. B. R., 86, S. C.; 6 Am. Law Reg.; N. S., 765, 772; and *Tobin* v. *Trump*, 7 Phila., 123; and of cases in the United States Courts; *Thornhill* v. *The Bank of Louisiana*, 3 N. B. R., 435; S. C., 5 N. B. R., 367; and *In re* Merchants' Ins. Co., 6 N. B. R., 43. The grounds seem to be: 1. That Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States. That this *establishment* of *uniformity* is incompatible with State legislation on that part of the subject to which the acts of Congress may extend: Per Marshall, C. J., in *Sturges* v. *Crowninshield*.

Second. That two statutes having the same general object, and acting upon the same persons and cases by different modes and in different jurisdictions, must be in conflict with each other: Per Sanderson, J., in *Martin* v. *Berry*; and see per Washington, J., in *Houston* v. *Moore*, cited 1 Kent's Com., star page 389. These cases being our guide, the State law was suspended.

II. Those which are supposed to affirm a State law, though providing for cases within the purview of the Bankrupt Law, if the State statute is not in its operation repugnant to the latter Act, but squares with its main purpose, is not in conflict until the Bankrupt Law is put into force in the courts of the United States; for, until then, it does not impede the operation of the Bankrupt Law.

To this effect may be cited: *Beck* v. *Parker*, 65 Penn., 262; *Cook et al.* v. *Rogers*, 13 N. B. R., 97; *Reed* v. *Taylor*, 4 N. B. R., 710; 32 Iowa, 209; *Sedgwick* v. *Place*, 1 N. B. R., 673; *Langley* v. *Perry*, 2 N. B. R., 596; *re* Geo. A. Hawkins, 2 N. B. R., 378; 34 Conn., 548.

The grounds are, that when the State law has the same general purpose, and accomplishes substantially the same results as the law of Congress, and withal furthers its intention and aids to defeat what is contrary to its spirit, the State law is then auxiliary and not conflicting, though administered by different methods and in different jurisdictions.

If a law of Congress may permit a State law to have a limited operation on cases within its scope, this view finds strong support in the late Act of Congress of February 3, 1873, relating to corporations and insurance companies, Section 5123 of the Revised Statutes, and in the language of Mr. Justice Miller, in *Chandler* v. *Siddle*, 10 B. R., 236.

It is to be observed, with respect to the cases cited for this second proposition, that in *Reed* v. *Taylor*, only was it supposed by the court that the suspension of a State law by a law of the Union was a question involved in the case. In the two first above cited cases, and in the last, it was distinctly declared that the question did not arise. They are all cases on the validity of deeds rather than the suspension of laws.

But if this be the correct doctrine, the plaintiffs take nothing under it, for it has been shown that the State law is not in accordance with the law of Congress.

III. Those which assert that the State laws (repugnant or not) exist and operate with full vigor until the Bankrupt Law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefit of the Bankrupt Law by being declared a bankrupt by decree of the court. Before that the Bankrupt Act does not come in conflict with the State law.

This is the view favorable to the plaintiffs. The ground

is that while the law of Congress is supreme, it is not necessarily exclusive of all State legislation on the same subject, unless so declared or intended, and that the Bankrupt Act has not, either by express or necessary implication, denied all operation to State laws providing for cases within its purview, but that on the whole, the implication is the other way, namely, that the State law should operate until the Bankrupt Act should be put in force by proceedings commenced under it, and that consequently there is not a conflict of laws until there is a conflict of jurisdiction. The principal cases usually adduced in support of it are the following, namely, *ex parte* John Zeigenfuss, 24 N. C., 463; *Clark* v. *Rist*, 3 McLean, 494; *Reed* v. *Taylor*, 4 N. B. R., 710; 32 Iowa, 207, and *Maltbie* v. *Hotchkiss*, 5 N. B. R., 485; 38 Conn., 80. It is worth while to examine them one by one. As to *Clark* v. *Rist*, then, it will be found on referring to it, that it does not bear upon the question. And there is an observation common to the other three cases, that in each of them the law provided for distribution *pro rata*, and the last two are cases supporting the second rather than the third proposition.

In *Reed* v. *Taylor*, the plaintiff caused the defendant's property to be attached on the 26th of October, 1869. On the day before, Taylor, the defendant, had made a deed of general assignment of all his property, including that attached for the benefit of all his creditors *pro rata*. The court below held the assignment void. The Supreme Court reversed the court below, Day, C. J., dissenting.

Ex parte, John Zeigenfuss is the oldest and the leading case. The third proposition is the language of Judge Battle in delivering the opinion in this case. It was an application to him, not a judge of the Supreme Court, for a writ of *habeas corpus*, to be discharged from the custody of the sheriff of Wake county. The applicant had filed his petition for the benefit of the Bankrupt Act of the United States, in the District Court for North Carolina. After the petition was filed, a writ of *capias ad satisfaciendum* was issued from the Court of Pleas, and under this writ the sheriff took the body of the

petitioner and detained him in custody. Judge Battle obtained the assistance of the three judges of the Supreme Court. They were all of opinion, and he concurred, that the cause shown for the discharge of the applicant was insufficient. He explicitly states that the judges of the Supreme Court concurred in the *conclusion*, but were not answerable for the course of the argument by which it was arrived at.

In this case, then, the debtor had not invoked the aid of the State Insolvent Law, and the question was, whether he, after the filing of his petition for the benefit of the Bankrupt Act, could lawfully be arrested and held in custody under execution for the collection of a debt. That he could be, was decided, and nothing more.

Maltbie v. *Hotchkiss* was this: The defendant, a deputy sheriff, 23d November, 1870, attached property of Smith. The same day Smith lodged with the Court of Probate a deed of assignment under the insolvent laws of Connecticut (which provide for *pro rata* distribution). November 30th, plaintiff was appointed trustee. December 9th, the attaching creditors obtained a judgment against Smith. No proceedings in bankruptcy were instituted. Replevin by plaintiff claiming as trustee, the property in the sheriff's hands, who claims to hold it by virtue of the attachment, on the ground that the Bankrupt Law repealed in *toto* the insolvent law of the State, so that it could not operate to dissolve the attachment. The question seems to have been whether the deed of assignment was valid, and the court held it was on the authority of *re* George A. Hawkins, 2 N. B. R., 378; 34 Conn., 548. But in that case it was distinctly asserted that the suspension of the State statute was not a question in the case, because the deed of assignment did not derive its validity from the statute.

The argument of Mr. Justice Carpenter is based on the distinction between discharging a debtor and distributing his assets. He agrees that should the court attempt to grant a certificate of discharge to an insolvent debtor, no court would give any effect to it. This must be on the ground that

the Bankrupt Act did, *ipso facto*, suspend the State law so far. But he insists that the discharge is the principal thing the Bankrupt Act has in view, and that distribution *pro rata* among creditors is but incidental. This ground is scarcely tenable since *Buchanan* v. *Smith*, 4 N. B. R., 397; 7 N. B. R., 513; 16 Wall., 277, in which case Mr. Justice Clifford, delivering the opinion of the Supreme Court of the United States, says: "Equal distribution of the property of the bankrupt, *pro rata*, is the main purpose which the Bankrupt Act seeks to accomplish." And it has no other purpose at all with respect to corporations. (See also Cornwell's Appeal, 7 W. & S., at page 305; *Com.* v. *O'Hara*, 1 N. B. R., 86; 6 Phila., 402.) That part of the opinion which discusses whether the deed was absolutely void as violative of the 35th and 39th Sections of the Bankrupt Law, we are not now concerned with.

How far these four cases support the proposition they have been cited to sustain, we are now able to see, and we think they do not support it in its whole extent, namely, that a State law hostile to the Bankrupt Act in either of its two great objects, discharge and distribution, *pro rata*, is not by it *ipso facto* suspended.

In opposition to this view, the following objections readily present themselves:

First. That if the Bankrupt Law may be construed as providing or intending that repugnant State laws on the same subject shall exist and operate with full vigor, notwithstanding that law, until the benefit of it is invoked in the courts of the United States, Congress can hardly be said to have established uniformity on the subject of bankruptcies throughout the United States, which must be done if Congress act at all on the subject; and 2. That it is difficult to perceive such an intention in the Bankrupt Law. 3. That this construction leaves the suspension of the State Law, and the operation of the law of Congress dependent upon the will of the debtor and his creditors; and (4) may lead to embarrassment by stopping the proceedings in the State court in the midst,

after orders and distributions made, that the Bankrupt Law and the courts acting under it will not sanction.

With respect to the question before us, the Act of Congress of February 3, 1873, Rev. S., Section 5123, relative to Insolvent Corporations and Insurance Companies, will not fail to attract attention. There is a clear implication from it that a State court may proceed to wind up an insolvent corporation under certain circumstances, if proceedings have not first been instituted in bankruptcy. But it gives no countenance to the contention that the State court may do so, even if the State law, which it administers, is in the teeth of the Bankrupt Law.

The court may act only if it can make an order agreeably to the State law for a ratable distribution to creditors.

This act only recognizes proceedings commenced in the State court for the purpose of dividing the assets of the corporation ratably among its creditors. Ratably is proportionally *pro rata*. It is pregnant with the denial of the validity of proceedings where the State court cannot agreeably to the State law make a *pro rata* distribution. It adheres to the "main purpose" of the Bankrupt Law. It affords, as was said before, support to the position that a State law in accord with the Bankrupt Act is not suspended, but not to the doctrine that such a law, contradictory and repugnant in its operation, is not suspended. Nor does the case *Watson* v. *Savings Bank*, 9 N. B. R., 458; 11 N. B. R., 161, conflict with this construction.

This most interesting question, which can only be finally and authoritatively decided by the Supreme Court of the United States, is one scarcely even to be agitated in a Court of Common Pleas. But compelled to come to a conclusion upon it, we have thought proper to state the reasons, and have hoped by gathering and grouping the cases, to be of some service to those concerned with this cause in its subsequent stages. If there are high authorities on either side of this question, we think they are not at least equally balanced; and following the example of Williams, J., in *Com.* v. *O'Hara*,

and Thayer, J., in *Tobin* v. *Trump*, we have felt at liberty to say, that the State law, under which the deed of assignment was made, because its provisions are within the purview of the Bankrupt Law, and repugnant to its main purpose, was, by the passage of that act, *ipso facto* suspended.

Now, if the statute, so far as it provided for cases within the purview of the Bankrupt Act, was, on the 1st of June, 1867, suspended, and since that time has not had the force of a law, the deed of assignment to the plantiffs made as part of the machinery of the law for winding up the bank and distributing its assets, and deriving all its validity and efficacy from the statute, was void. For it was not the deed but the statute which worked the transfer of the property, and without the deed the transfer would have been made by operation of law. It was not the free act and deed of the corporation, but simply an appliance of the law to evidence the transfer.

If the statute was suspended, the deed was unauthorized and void; but if it was not suspended, still a question may remain, whether the deed was not void on the ground that it contravenes either the provisions or the policy of the Bankrupt Law.

This question is now to be considered.

And for the purpose of clearing the way, a general assignment for the benefit of creditors, which does not give preferences, but which secures the equal distribution of all the property of a debtor among his creditors, is not contrary to the spirit of the Bankrupt Act. (*Beck* v. *Parker*, 65 Penn., 262; *Cook et al.* v. *Rogers*, 13 N. B. R., 97; *Re* Geo. A. Hawkins, 2 N. B. R., 378; 34 Conn., 548.) But the assignment to the plaintiffs was of a different kind; it provided for a distribution according to the law under which it was made, that is, according to a certain order of priority. And if it had not done so in terms, still the distribution by the assignees must have been made under that law. Indeed, even if this law is suspended, no assignment can be made by a State bank except subject to the conditions and provisions of this law. For the power to do so was taken away by this law,

which has not been repealed, but only suspended, and so the power has not been restored.

This assignment, then, providing as it does for preferences, and working an unequal distribution of the property of the bank among creditors, does, undoubtedly, contravene the policy of the Bankrupt Law, because, as we have seen above, from the case of *Buchanan* v. *Smith*, equal distribution is the main purpose of that law. The intention and policy of the law must be ascertained by considering the law as a whole. Mr. J. W. Smith, in his work on Contracts, at page 228, 4th Am. ed., has an opposite illustration: "The words 'policy of the law' indicate the spirit of a law as distinguished from the letter of it; as when it is said that contracts made by a trader, giving a preference to particular creditors, although not forbidden by the letter of any enactment, violate the policy of the Bankrupt Laws, the first object and policy of those laws being to make a ratable distribution of a bankrupt's property amongst all his creditors," citing *Egerton* v. *Brownlow*, 4th H. of L. Cases, 1, 87, 196.

Now a deed or agreement contravening the ends and objects of the Legislature, that is to say, the policy of the law, is void. It belongs to the class of illegal contracts, and as such would ordinarily be not voidable but void. (Smith on Contracts, 226; *Pearsall* v. *Chapin*, 44 Pa. St., 14; *Davis* v. *Holding*, 1 M. & W., 159, 165, 166; *Staines* v. *Wainwright*, 6 Bing. N. S., 174.) If, therefore, there were nothing in the Bankrupt Law itself which fixed the state of a deed open to this objection, there would be much reason for holding such a deed to be wholly void and a nullity. But there is that in the Bankrupt Law which will not allow such an effect to this vice in the deed. For that in the deed which violates the general purpose and policy of the law, violates, at the same time, the express provisions of two sections of the law, namely, the 35th and 39th, R. S. of U. S., Sections 5128, 5129. These sections declare that if any one shall make a transfer of property with intent to prefer one creditor over another, or to make a distribution of his estate different from

that provided for by the Bankrupt Act, the deed, if made within a certain number of months before the filing of the petition in bankruptcy, shall be void, and the assignee may recover the property.

No one can read these sections and fail to see that the deed is not by them made void, except with reference to proceedings in bankruptcy, and is good against all comers, except the assignee in bankruptcy, and is good against him after a certain time. And so are the cases of *Seaman* v. *Stoughton*, 3 Barbour Ch., 344, 349; *Maltbie* v. *Hotchkiss*, 5 N. B. R., 485; 38 Conn., 80; *Atkins* v. *Spear*, 49 Mass., 490; *Dodge* v. *Sheldon*, 6 Hill, 9.

We cannot see how the same vice can work different effects, as it is regarded as violating the express provisions or the general policy of the law. We think the deed of assignment to the plaintiffs was not void, except as to an assignee in bankruptcy, on the ground that it contravened the provisions or the purpose and policy of the Bankrupt Act. But on the ground that it was only a part of the appliances of a law which was suspended, we think the deed was void.

And now, as to the question of set-off, it has been contended that the draft for two thousand six hundred dollars, drawn by the Farmers' and Mechanics' Bank of Shippensburg on Philadelphia, in favor of the First National Bank, and indorsed to the defendant after maturity, is not included in the word "obligations," as used in the law, and is not such a note of obligation as the assignees must accept in payment of debts due to the bank. This contention, strenuously urged by Mr. Brewer, is not supported by authority, and it seems clear that a draft drawn by a bank is one of its obligations.

The fact that the draft was taken by the defendant after the assignment by the bank to the plaintiffs, and with knowledge of it, is of no consequence, as ruled in *Bank* v. *Spangler*, 32 Pa. St., 474. The cashier of the First National Bank had authority, as such, to make the indorsement and transfer the draft. (*Bank* v. *Reed*, 1 W. & S., 101, 106; *Matthews* v. *Massachusetts National Bank*, 14 Am. Law Reg., 153.) To the

objection that the writing on the back of the note given for the draft, shows that the note was not to be paid by defendant, except to the extent to which he should be able to make use of the draft; and that therefore the transfer of the draft to the defendant was conditional, Mr. Stewart has answered that it is not the transfer of the draft which is conditional. That is absolute. What is conditional is the payment of the note which defendant gave for the draft. It will not again become the property of the First National Bank in any event. That is a satisfactory answer. The intention of the law is clear, that the notes and obligations of the bank, and the checks of its depositors, shall be as good as gold in payment of its debts. The draft is such an obligation of the bank in the defendant's possession, honestly and for all purposes, and he may use it in payment, or as a set-off. It is easy, indeed, to see how this will give one creditor a great advantage over another, but this law does not intend equality among creditors.

On the whole, the issues are proved for defendant, and judgment will be entered in his favor.

COURT OF APPEALS—MARYLAND.

After a resolution of composition has been duly adopted and confirmed, the debtor may have an attachment quashed that has issued against him within four months before the commencement of the proceedings in bankruptcy, for the debt is thereby extinguished.

JOHN M. MILLER v. *GEORGE N. MACKENZIE and others.*

BOWIE, J.—On the 4th of November, 1874, the appellant sued out of the Court of Common Pleas an attachment, on mesne process, against G. N. Mackenzie, C. B. Mackenzie, and C. T. Mackenzie, partners in trade, which was returned by the sheriff, "*laid as per schedule.*"

The defendants, at January Term, 1875, moved to quash the attachment, for various reasons assigned, and afterwards, on the 25th of May, 1875, filed a special plea, alleging that the defendants were duly adjudicated bankrupts upon the 5th of December, 1874, upon the petition of their creditors, filed the 25th of November, 1874; that after said adjudication, a meeting of the creditors of said defendants was duly called, under the Amendatory Act to the National Bankrupt Act, Section 17, approved June 22, 1874; that at said meeting, at which plaintiff, although present, took no part, and did not vote upon or sign the resolution—a resolution for composition of the debts of said defendants for twenty-five per cent. cash was duly passed and confirmed, under the provisions of said act, and the statement required by said act was duly produced, and therein the names, address, and amount of the debts of said plaintiff was duly sworn in said statement; that said resolution and statement was duly presented to the Judge of the District Court of the United States for Maryland District, and said court duly caused said resolution to be recorded, and the said statement to be filed; that the amount of money properly due said plaintiff under said proceedings for composition, was duly tendered to him, and by him refused; and all the other creditors have accepted said propositions, and been paid.

It was agreed by the counsel for the plaintiff and defendants in the court below, that the motion to quash should be set down for hearing, upon a statement of facts, substantially the same as those embodied in the plea, and which we deem it, therefore, unnecessary to recite.

Whereupon the court, on the 22d of May, 1875, ordered that the attachment be quashed, from which order the plaintiff appealed.

On behalf of the appellant it is insisted, that the jurisdiction of the State court having been asserted before the adjudication in bankruptcy, it cannot be divested except in very clear cases; that the power of Congress over State process, for the collection of debts, is implied from the express

power conferred on it to legislate on the subject of bankruptcy, which implied power should not be extended by construction.

The appellee, on the other hand, contends that the claim of the appellant is in direct conflict with the main object of the Bankrupt Laws, the just distribution of the bankrupt's assets among all his creditors; "that it is an attempt of one creditor, by a suit based upon an alleged act of bankruptcy, to obtain for himself payment in full at the expense of the other creditors." * * * * *

It is argued that bankrupts who pay the amount of the composition to all the other creditors, are virtually the purchasers of their respective interests in their estates; and if the appellant can, by his attachment, obtain more than the rate of composition, so much the more are the respective interests of the other creditors diminished. The statement of facts admitted, upon which the motion to quash was submitted and decided by the court below, embraced substantially all the essential conditions of a composition among the creditors of a bankrupt, prescribed by the 17th Section of the Act of Congress of 1874, amendatory of the act to establish a uniform system of bankruptcy throughout the United States.

It is declared by the provisions of the same section, that the composition accepted by the resolution of the creditors, shall be binding on all of the creditors whose names and addresses, and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors. By another clause of the same section of the supplement to the act, the provisions of any composition made in pursuance of the act, may be enforced by the court, in a summary manner, by any person interested, and on reasonable notice; and any disobedience of the order of the court, made on such motion, shall be deemed to be a contempt of court.

The 8th section of the 1st Article of the Constitution of the United States, declares "The Congress shall have power

to establish uniform laws on the subject of bankruptcies throughout the United States."

Chief Justice Marshall, in the case of *Sturges* v. *Crowninshield*, in defining the subject says, it is divisible in its nature into bankrupt and insolvent laws. "That laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws." (4 Wheaton, 122, 194.) If the composition, as we have seen, binds the plaintiff as one of the creditors of the appellees, there can be no doubt that the plaintiff's claim is discharged, the debt is extinguished; otherwise, the Bankrupt Law would be virtually annulled by the process of attachment pending but not matured at the institution of the proceedings in bankruptcy. The cases cited by the appellants, confirm the conclusion which we should deduce from general principles. In the case *In re* Preston, 6 N. B. R., 545, an attachment was laid on the 20th February, 1871.

On the 4th of March there was an order of sale to prevent loss by delay. On the 18th of March the defendant Preston filed a petition in bankruptcy. On the 20th sale was made and money deposited.

A special case was submitted to the court—the United States District Court for Washington Territory. To the question, whether the filing of the bankrupt's petition on the 18th of March dissolved the attachment and rendered null and void the sale and all proceedings thereunder, the court said the attachment was dissolved from the date to which the assignment in bankruptcy relates; that is, from the time of the commencement of the bankruptcy proceedings. The operation of the assignment in reference to the attachment was not to avoid it *ab initio*, but to arrest all proceedings under it, to dissolve it as of the date of the filing of the petition in the Supreme Court; to leave untouched all previously accrued rights, to prevent the subsequent accruement of rights under the attachment.

The case of *Johnson* v. *Bishop* (8 N. B. R., 533), as condensed in the syllabus, decides, where property has been

attached by an officer of a State court on mesne process within four months prior to the commencement of proceedings in bankruptcy, the attachment is dissolved by the Bankrupt Law; but the assignee in bankruptcy must apply to the State court to have the officer directed to turn over the property, and not to the Federal Court. "This rule has been established to avoid conflict of jurisdiction, and through the comity of courts, exercising jurisdiction in the same territory, over the same subjects, and often the same class of litigants and drawing their existence from different sources, and which are to one another as foreign tribunals." *Corner* v. *Mallory*, 31 Md., 478, decided by this court, recognizes the same general principles.

There is not in this case any assignee to represent the debtor in the attachment suit, or to claim the property attached, or its proceeds, by virtue of the assignment. But the same reason which compels the State courts to recognize the authority of the courts in bankruptcy in cases of assignment, to wit, the exclusive jurisdiction of those courts in matters of bankruptcy, must compel the State tribunals to respect the composition of creditors adopted under the sanction of the Courts of Bankruptcy, in conformity with the provisions of the Bankrupt Law.

The debt of the attaching creditors is extinguished by the composition, and the attachment, of course, falls to the ground.

Judgment affirmed.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Where there are assets of a firm and of individual members thereof, each estate must pay its proportion of the entire expenses of administering the estate.

Where there are partnership assets, the firm creditors cannot share in the individual estate.

In re ELIJAH E. SMITH and GEORGE SMITH.

THE above-named bankrupts were co-partners under the

firm name of E. E. Smith & Son, and were declared bankrupts under a petition in involuntary bankruptcy filed against the firm. The assignee filed a petition in court, inquiring whether the firm-creditors could share *pari passu* with the individual creditors of E. E. Smith, and alleging that there was no firm estate, and no solvent partner. An order for the individual creditors to appear and show cause was granted, and on the return day several of them appeared and joined issue, and the matter was referred to the Register to take proofs, and report on the same with his opinion thereon to the court. The Register filed the following report:

In pursuance of an order of this court bearing date April 6, 1875, in and by which I am directed to take the proofs offered by the parties, and report the same to this court, with my opinion as to whether or not the creditors who have proved their debts against the estate of the firm of E. E. Smith & Son, bankrupts, should be allowed to prove, or their present proofs stand good against the estate of Elijah E. Smith, one of said bankrupts, I respectfully report:

That I have been attended by the parties and their counsel, and have taken all the evidence offered before me, which is herewith returned:

The following facts are established from the evidence—

The total receipts by the assignee from the estate of E. E. Smith & Son, are	$233.85
From the individual estate of Elijah E. Smith..	3,162.42
From the individual estate of George Smith...	nothing
Total receipts	$3,396,27
The total disbursements	1,481.19
Leaving balance in the hands of the assignee of	$1,915.08

Section 36 of the Bankrupt Act (Section 5121 of the U. S. Revised Statutes) provides that the assignee "shall keep separate accounts of the joint stock or property of the

co-partnership and of the separate estate of each member thereof, and after deducting out of the whole amount received by the assignee, the whole of the expenses and disbursements, the net proceeds of the joint estate shall be appropriated to pay the creditors of the co-partnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors."

Under the provisions of this section, it is, I think, clear that where there are assets of a firm and of individual members of the firm, that each estate must pay its proportion of the entire expenses of administering the estate. This would leave in the hands of the assignee, after payment of all the expenses of administration, a fund belonging to the firm estate for distribution among the creditors of that estate. And such being the case, the firm creditors cannot share in the individual estate of Elijah E. Smith until his individual creditors are paid in full. (*In re* McEwen & Sons, 12 N. B. R., 11; Story on Part., Section 380).

All which is respectfully submitted.

D. F. GOTT,
Register in Bankruptcy.

The assignee thereupon filed exceptions to the Register's report.

Messrs. Markham & Smith for the assignee, cited *In re* Knight, 8 N. B. R., 436, and cases cited; *In re* McEwen & Sons, 12 N. B. R., 11, and cases cited; Lord Laughborough's order of March, 1794, given in Montague & Ayrtoun's Bankruptcy, Vol. I., 748; Rules 76 and 113 under the English Bankrupt Act of 1869, published in Roche & Hazlett's Bankruptcy, 523 and 530; *Ex parte* Rutherford, 1 Rose, 201; *Ex parte* Longman, 1 Rose, 303.

Messrs. L. C. Gardner and *W. C. Ruger*, for the individual creditors.

WALLACE, J.—Let an order be entered confirming the report of the Register.

UNITED STATES DISTRICT COURT—OREGON.

In a case of involuntary bankruptcy, the burden of proof is on the petitioning creditor.

A debtor is insolvent if his property, put up on reasonable notice for sale, where it exists under the circumstances of the case, will not bring cash enough to pay his debts.

A petitioning creditor is not required to make full and complete proof of the debtor's insolvency, but may offer proof tending to show his insolvency, and the debtor must then explain the evidence if possible, for he is best acquainted with the condition of his own affairs.

A defense which has been stricken out of the case may be given in evidence as an admission.

A paper sworn to and filed by an officer of a corporation is competent evidence against it, but is not conclusive.

No particular or specific evidence of an intent to prefer is necessary when a payment is made by an insolvent debtor, for the act itself is sufficient evidence of the intent.

The law will not presume an intent to prefer when the debtor is not aware of his insolvency, but it is incumbent on him to show it.

The knowledge or motive of the preferred creditor is immaterial in an involuntary proceeding.

A payment by an insolvent debtor is an act of bankruptcy, although it is made in the usual course of business.

A debtor who is solvent may pay any or all of his debts, although proceedings in bankruptcy are pending against him.

A voluntary contribution received by a debtor, does not constitute a debt due by him.

A voluntary agreement between certain persons, to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedness to him.

A corporation by appearing and answering a petition, thereby admits that it may be proceeded against in bankruptcy, and cannot afterwards object that the petition does not allege that it is a moneyed, business, or commercial corporation.

In re OREGON BULLETIN PRINTING AND PUBLISHING CO.

H. G. Thompson and *George H. Durham*, for petitioning creditors.

Joseph N. Dolph and *Joseph Simon*, for defendant.

DEADY, J.—The plaintiffs in this case, Blake, Robbins & Co., Leuthwait & Smith, H. W. Scott, and H. L. Pittock, called in the pleadings the petitioning creditors, bring this action to have the defendant declared a bankrupt. The petition alleges that the defendant is a corporation organized under the laws of this State, with its place of business at the

city of Portland, and that at the commencement of this action it owed debts to certain persons, naming them, amounting to about twelve thousand dollars, of which sum four thousand four hundred and eighty-one dollars was due these plaintiffs, and by them provable in bankruptcy; that the defendant on June and July 1, 1875, was insolvent, and committed two several acts of bankruptcy by paying the Western Union Telegraph Company the sums of six hundred and twenty dollars and seven hundred and ten dollars, with intent to give said telegraph company a preference, and also on August and September 1, 1875, was insolvent, and committed two other acts of bankruptcy, by paying to Alexander P. Ankeny on each of said dates the sum of one hundred and forty dollars, with intent to give said Ankeny a preference.

The defendant, by its answer, admits that it is a corporation formed under the laws of Oregon; that it is and was indebted to the plaintiffs, except Scott's debt of three thousand dollars, as alleged; that the several payments to the telegraph company and Ankeny were made by it as alleged; and denies that it is or was indebted to Scott; that it is or was insolvent at the dates of said payments, or any of them; that said payments or either of them were made with intent to give said telegraph company or Ankeny a preference; but avers that said payments and each of them was made in the ordinary course of its business, when and as they became due, and without any intent to prefer said creditors, or to defeat, hinder, impede or delay the operation of the Bankrupt Act.

In the course of the argument, something has been said about the nature and operation of the Bankrupt Act—the law under which this proceeding takes place.

It is hardly necessary to say to you, that you and I are both here to administer the laws as we find them; and it does not become us in any way to obstruct the fair and full administration of any of the laws of the United States on account of our personal opinions or prejudices concerning its propriety or expediency.

In re Oregon Bulletin Printing and Publishing Co.

The Bankrupt Act has been enacted by the Congress of the United States, representing the people of the United States, in pursuance of an express authority to that effect in the Constitution of the United States. It is intended to meet the case when a debtor becomes unable to pay his debts as they become due in the ordinary course of business, to prevent any of his creditors from getting an advantage over the others, either by the pertinacity or industry of such creditor or connivance of the debtor.

It goes upon the just and proper theory that the property of an insolvent debtor belongs to his creditors and not to himself, and that such creditors have a right to dispose of it and distribute the proceeds among themselves in proportion to the amount of their respective claims; that such debtor has not a right to dispose of and distribute it among his creditors as he may think proper or feel inclined to; and that this is a just and proper view of the subject it seems to me cannot be successfully gainsaid.

The law also proceeds upon the theory in such cases, that economy, and the interest of the debtor and the whole body of creditors will be promoted, by preventing separate and expensive proceedings by each of such creditors, and therefore the whole matter of the insolvent estate, and the claims of the respective creditors upon it, shall be settled in one proceeding, with as little controversy and expense as possible.

There is then no special hardship in this law as compared with any other intended to regulate the rights and relations between creditors and an insolvent debtor. In some respects it is a hardship and an unpleasant thing to enforce the collection of a debt against a failing party by any means which can be provided, and which at the same time are effective. But as long as debts are to be collected by legal proceedings, and insolvent debtors are required to surrender their property to their creditors, the proceedings provided by the Bankrupt Act are as humane, just, and economical a mode of accomplishing this end as has ever been devised.

A question has been made at the last moment in this case as to whether the law casts the burden of proof upon the plaintiffs or defendant.

As the law stood prior to June 22, 1874, it contained a provision in Section 41, which in effect required the debtor to show upon the trial that the facts stated in the petition were not true, or else the verdict should be found against him. In some respects this was a harsh and hard rule of evidence, but from the nature of the case, in most respects it did not differ in operation from the ordinary rule on the subject. Most, if not all of the material allegations in a petition in bankruptcy relate to the conduct of the debtor or the state of his affairs. In the nature of things, he is usually better informed as to the truth and details of the alleged transactions than his creditors can be. Therefore, upon slight proof against him in these respects he would be called upon to explain and show that his conduct had been proper or that his estate was solvent.

By Section 14 of the Act of June 22, 1874 (18 Stat., 182), Section 41 of the Act of March 2, 1867, was amended so as to repeal this provision requiring the debtor to disprove the facts in the petition, and therefore counsel for the defendant contends that the burden of proof is now upon the plaintiffs. On the other hand counsel for the plaintiffs insist that the Act of June 22, 1867, *supra*, is void and inoperative, because the said Act of March 2, 1867, was repealed by the first clause of Section 5596 of the Revised Statutes on said June 22, 1874, and, therefore, there was no such act in existence to amend, at the time of the passage of the supposed Amendatory Act. How this question should be decided I am not quite certain in my own mind, but for the purposes of this trial I will follow my impression, and hold that the act is operative, and that the rule prescribed in Section 41 of the Act of March 2, 1867, is, therefore, changed. This being so, the burden of proof in this case is upon the plaintiffs, and the defendant is not called upon to show that the facts stated in the petition are not true, except it be in such particulars

and under such circumstances as your attention will be called to particularly hereafter.

It is incumbent upon the plaintiffs, then, to make out their case to establish to your satisfaction under the instructions of the court three things: 1. That the defendant owed the plaintiffs, or some of them, the debts alleged to be due them in the petition. 2. That the defendant was insolvent at the dates of the several payments to the telegraph company and Ankeny, or one of them; and 3, that said defendant made said payments or one of them, being so insolvent, with intent to give such creditor a preference over its other creditors.

Upon the first point you can have no difficulty, as it is admitted by the defendant in its answer that it did owe all the plaintiffs' debts as alleged in the petition, except Scott's. That admission is sufficient upon this branch of the case to enable plaintiffs to maintain this action.

As to the second point, it is a matter for you to decide, and I instruct you upon it as I have heretofore held (*In re* Randall *et al.*, Deady, 562; s. c., 3 N. B. R., 18), that a party is insolvent when he is unable to pay his debts as they become due, no difference whether it is probable or not that if time is granted him he may be able to pay them sometime thereafter.

A debtor must pay his debts in money; that is the only legal tender. He must be able to pay them in money; either because he has the money at the time or because his property, if put to sale at once, could be converted into cash sufficient to pay them. This is as favorable an exposition of the matter for the defendant as can be made. The defendant need not have the money on hand to pay its debts—not a cent of it—but if its property, put up, upon reasonable notice, for sale, where it exists, under the circumstances of the case, will bring cash enough to pay its debts, it is not insolvent—it is able to pay, and, therefore, solvent. But if it will not, then it is insolvent—unable to pay. As this court said *In re* Randall, *supra*, if the amount of a debtor's debts cannot be made out of his property on legal process—on execution—

when they become due, he is insolvent. This is a question upon which the plaintiffs are not required to make that full and complete proof that they would be of an ordinary issue in which they held the affirmative. Although the burden of proof is upon them, this is rather in the nature of proving a negative, or of a proposition concerning which the facts are best known to the adverse party. The defendant knows best what its assets are, what its debts are, and what the condition of its affairs is. It can most conveniently and certainly show the state of its affairs, and whether it is insolvent or not; and, therefore, when the plaintiffs offer proof tending to show that the defendant is insolvent and unable to pay its debts, explanation, so far as it appears that it can conveniently make it, is required at its hands. If any explanation of its affairs, which it appears to you it could conveniently have made, is not made by it, this is a circumstance against the defendant to be considered by you in making up your minds upon this question. Still, in the matter of proof, you must be satisfied as reasonable men, considering the definition of insolvency given you by the court, that the defendant was insolvent at some of the dates of the alleged preferences, before you can find by your verdict that it was so.

In considering this question, you should take into account the nature of the defendant's property—what it consisted of—how marketable it was—whether it was of a kind that could be sold in the market at any time for something like its cost or ordinary value, or otherwise. If the defendant's means are in unsalable property, and it must be converted into cash for the purpose of paying its debts, it is the misfortune of the defendant, and it must bear the consequence of that misfortune. That circumstance does not preclude the plaintiffs from demanding their debts, or seeking the collection of them by any mode appointed by the law.

It is alleged in the petition that the debts of the defendant, at the time of the filing thereof, amounted to nearly twelve thousand dollars. The answer of the defendant admits this allegation, except as to the debt claimed by Scott, upon which

three thousand dollars is alleged to be still due. Counsel for the respective parties footed up in their arguments to you the statements made by the witnesses as to the value of the defendant's property. So far as this branch of the case then is concerned, take this property, and from the evidence, considering the kind of property it is, and relying upon your judgments and experience as men of common sense and ordinary observation, and say what it is worth—was worth on or between the date of the alleged preferences—what it was worth in cash—what could be realized from it on execution. Then ascertain what the defendant owed at the same time, and compare them; and if what it owed was substantially in excess of what its property was worth, the defendant was insolvent; but if not, then it was not insolvent.

A written admission of the defendant's has been offered in evidence upon this point, which it is the duty of the court to construe and give you the effect of.

Eleven days after this action was brought, the defendant filed this paper in this court as a defense to the action. It was afterwards determined by the court that it was no defense, and it was stricken out of the case. But, nevertheless, it is a part of the files and records of this court, and is an admission as to the facts contained in it. The paper reads: "It (the defendant) denies that one-fourth in number of its creditors have petitioned to have it adjudged a bankrupt; and it denies that the aggregate of the debts of said creditors, filing said petition, constitute an amount one-third of the debts provable against it under the Act of Congress, entitled an Act to establish a Uniform System of Bankruptcy throughout the United States, approved March 2, 1867." This is an admission, statement, or assertion that four thousand four hundred and eighty-one dollars, which I believe to be the aggregate of the debts stated in the petition as being due the plaintiffs, was not one-third of the debts of the defendant, provable against it in bankruptcy. Of course, if this statement be true, the debts of defendant would amount to not less than thirteen or fourteen thou-

sand dollars. But the writing proceeds: "And the Oregon Bulletin Printing and Publishing Company avers that the creditors filing said petition constituted less than one-fifth in number of its creditors, and the aggregate of their debts provable under said act amount to less than one-twenty-fifth of the debts so provable." If this statement is to be construed as referring to all the petitioner's debts, the same as the first one, it would follow that the debts of the company were then about one hundred thousand dollars, because twenty-five times the sum of the petitioner's debts amounts to that sum, and more.

It is contended on the part of the defendant, that the natural and legal signification of these words, "And the aggregate of the debts provable under said act amount to less than one-twenty-fifth of the debts so provable," is, that the debts of the petitioners, which the defendant admits to be debts due by it and provable against it, are only one-twenty-fifth of the whole debts of the corporation. There is no allegation in this statement that the alleged debts of the petitioners do not exist; there is no direct allegation to that effect, nor that they are not provable under the act; but it is claimed that the statement in the writing that the aggregate of the debts of the petitioners *provable under the act* are less than one-twenty-fifth of the whole debts of the corporation does not admit that any of such debts *are provable*. It seems to me that this is rather a fine distinction to put upon the matter, and that it is not the natural and ordinary signification and effect of the words, "the aggregate of their debts provable under the act amount to less than one-twenty-fifth of the whole debts of the defendant."

However, I leave it you for to say what is meant by the statement. If it means that the aggregate of the petitioner's debts is only one-twenty-fifth of the whole debts of the corporation, then it is an admission that the debts of the corporation exceed the sum of one hundred thousand dollars. On the other hand, if it be assumed, as now claimed by the defendant, that there is an implied protest or assertion in this

latter statement that all the debts of the plaintiffs were *not provable* under the act, still, it being now admitted that all the debts of the plaintiffs were then due and provable under the act, except Scott's, it is an admission that the debts of the corporation amounted to more than twenty-five times the aggregate of the plaintiffs' debts, less Scott's—or a sum near thirty-seven thousand dollars.

With these suggestions, I leave this statement with you, to find the legal effect and purport of the words used in it—for you to construe and give its effect along with the other proof in this case; only adding this: a corporation is an invisible, intangible being; it is a legal entity, and an abstraction; it has no personal existence except through its officers, and whatever they do, it does, and it is bound by them the same as you are bound by your acts in your own affairs. A corporation cannot say, true, This man said so and so, and he was our manager and secretary, but we are not bound by what he said, any more than you can. Corporations are represented to the world, and the world deals with them, through their officers; and whatever such officers do, binds the corporation the same as if it was a natural person. Of course, it is not always concluded by them any more than a natural person. It may show that the truth is otherwise, except where the law in particular cases estops a person to deny what he has said. A corporation is the same as a natural person in this respect; whoever represents it for the time being is the corporation, and whatever he does or says is its act.

In this case, the president of the corporation, Mr. Denny, deliberately came into this court, filed this paper, signed by him, and verified by his oath, to the effect that the debts of the petitioners provable under the act did not amount to one-twenty-fifth of the debts of the company.

But the defendant is not concluded by this statement. It may show that it was a mistake—that the contrary is true. But it is sufficient evidence of the facts contained in it, and unless explained, it is sufficient for you to act upon, just as

any other solemn admission of any other person. If you should be satisfied from the evidence that it is incorrect, that it was a mistake, from whatever motive or reason it was made, then you would not follow it. But you are not to jump at the conclusion that it is a mistake, because an admission made under those circumstances by a party representing a corporation is presumed to be true. But as I have already stated, the corporation is not conclusively bound by it; and if upon the whole evidence you are satisfied that the fact is otherwise, you ought to act accordingly.

In regard to the claim of Scott, it is only material in this case upon the question whether the defendant is insolvent or not. If the defendant owed Scott this amount of money, of course, the fact is a material element in the inquiry whether it was solvent or insolvent. Otherwise it is not a matter to be inquired of in this case, because there are enough of admitted claims to maintain this action.

Evidence has been introduced by the plaintiffs from the books and employees of the defendant, that Scott furnished it some five thousand five hundred dollars in money. It appears that during the summer of 1874 he furnished the bookkeeper of the defendant certain amounts of money from time to time, which money it had the benefit of. *Prima facie*, this shows that the defendant owes Scott that amount of money. But that may not be the case. There may be something behind this which would show the fact to be otherwise. But unless the defendant does show the contrary, if you believe the evidence of the plaintiff upon this point, you should find that the defendant owes Scott as stated in the petition.

The only evidence offered upon this point by the defendant is a deed or declaration of trust executed by Scott, from which it appears there had been conveyed to him absolutely by the Oregon Real Estate Company certain blocks of land in East Portland. This instrument was executed to show the true nature of that transaction, and by it Scott acknowledges that he is not the absolute owner of the property mentioned,

but that he holds it in trust for the purpose therein mentioned.

By this instrument Scott acknowledges that he holds this property as a security for any money he might advance to the defendant. The transaction is not one between the Oregon Real Estate Company and the defendant, but the former and Scott, for his security. Scott might have pledged this property for this money, or he might have obtained it in another way, but, however he obtained the money, he furnished it to the defendant, and for aught that appears in this instrument, he is its creditor to that amount, and not the Oregon Real Estate Company. Therefore, I instruct you that this instrument does not in any way affect the case upon this point.

As to the third point in the plaintiffs' case: The payments to the W. U. T. Company and Ankeny, or some of them, must not only have been made when the defendant was insolvent, but with an intent to prefer such creditor. If you find that the defendant was solvent when these payments were made, that will be the end of your inquiry, and your verdict should be for the defendant. But if you should find that the defendant was insolvent at the time any of these payments were made, then such payment being made with intent to prefer, is an act of bankruptcy. The Bankrupt Act declares that any debtor who, being insolvent, shall make any payment with intent to give a preference to one or more of his creditors, may be adjudged a bankrupt.

If, then, the defendant was insolvent at the time it made any of the payments alleged in the petition to the W. U. T. Company, or Ankeny, it thereby gave a preference—that is, it paid these parties their debts in full when it was not able to pay all its creditors in full, and by so much as it paid these parties more than their proportion of the assets, it preferred them to its other creditors; and in this respect it makes no difference whether the transaction was a great or small one.

If a debtor, being insolvent, pays any creditor the full

amount of his debt, he thereby gives him a preference. This is the natural and necessary consequence of his act. No particular or specific evidence is necessary to prove the intention to prefer. The act itself is sufficient evidence of the intent, because a party is presumed to intend the natural and necessary consequences of his act. For instance, if either of you had but one hundred dollars in money, and owed four other persons one hundred dollars each, and were to pay one of them, who might be your friend, that one hundred dollars, it is to be presumed that you intended to prefer him to the others; the law makes this presumption, because such is the natural and necessary consequence of your act.

The only exception to this conclusion is, where an insolvent debtor makes a payment which is a preference, believing himself solvent, or not being aware of his insolvency. In such case the law would not presume that he intended the preference. A debtor may be insolvent and not know it; but if such be the fact, it is incumbent upon him to show it. The law presumes that a person, and particularly a corporation, knows the state of its own affairs; and if the fact is otherwise, the party claiming the benefit of it must show it. If a debtor is in fact ignorant of his own insolvency, the law will not presume that he made a payment with intent to prefer, although such was the effect of it; or rather proof of his want of knowledge will overcome the presumption that he did so intend.

Upon this point I have been asked by the defendant's counsel to instruct you, that if the parties who received these payments did not know that the defendant was insolvent, then there was no intent to prefer. I decline to give you the instruction, because, so far as this proceeding is concerned, it is immaterial what was the knowledge or motives of the parties who received these payments.

Counsel for the defendant also asks me to instruct you, that a payment made in the ordinary course of business, and for the purpose of carrying on such business, is not within the purview of the provisions of the act relating to payments

by an insolvent with intent to prefer, and that an insolvent debtor making a payment under such circumstances does not thereby commit an act of bankruptcy. I do not so understand the law. If a debtor is insolvent and unable to carry on his business, there is only one of two things to be done. He must either stop business, or go on with the consent of his creditors. He is dealing with other men's property—the property of his creditors—and he must stop then or get their consent to go on. The payments to the W. U. T. Company and Ankeny, if made when the defendant was insolvent, are acts of bankruptcy. The defendant, if insolvent, had no right to carry on business except with the consent of his creditors; it had no right to pay any of its debts in full.

I am also asked by counsel for defendant to instruct you that it is admitted in the pleadings that these payments were made by the defendant in the usual and ordinary course of its business, when and as the same became due, without any intent, object, or design to hinder or obstruct the operation of the Bankrupt Act. I decline to give the instruction, because the question in this case is not whether the defendant made these payments with intent to hinder, delay, impede, or obstruct the operation of the Bankrupt Act, although such may have been the ordinary effect of them, but whether it made them with intent to give the parties receiving them a preference. It is true that it is admitted in the pleadings that these payments were made in the ordinary and usual course of business, but that is an immaterial matter, except as you may think it throws light upon the question of the defendant's insolvency at the time they were made. The fact that these sums were paid as such payments were usually made for telegrams and rent—on the first of the month—does not change the character of the act, because the defendant had no right to make such payments, if it was insolvent, at the expense of its other creditors. But the fact that it was not an extraordinary transaction—one not out of the usual mode of doing its business—may be considered by you, and given such weight as you think it ought to have.

If a debtor makes an unusual payment to a particular person, it may be inferred from that fact, or it may tend to prove, that he is in failing circumstances, and intended to provide for this person. But no such inference could be made from these payments on any such ground, for they were not unusual or out of the ordinary course of business. But it does not follow from this fact that the debtor was solvent.

Counsel for defendant asks me to instruct you, that under the Bankrupt Law, a debtor cannot pay his debts after proceedings in bankruptcy have been commenced against him. This instruction is asked for, I suppose, to meet the suggestion to you in the closing argument of plaintiffs' counsel, which was, that if the defendant was solvent, why didn't it pay its debts and stop this proceeding; and you were asked to infer from the fact that it did not pay them, it was unable to do so.

Upon this point I instruct you, that a debtor who is solvent may pay any or all of his debts, whether proceedings in bankruptcy are pending against him or not. Under such circumstances, a creditor might be disinclined to receive his debt and run the risk of being charged with knowingly receiving a preference, unless he had good reason to know or believe that the debtor was solvent notwithstanding the proceedings in bankruptcy. But there is nothing in the fact that proceedings in bankruptcy are pending against a debtor which prevents him from paying his debts if he is in fact solvent. True, if the creditors, for fear of forfeiting their debts, will not receive them, he cannot do more than offer to pay them. But if a debtor is able and willing to pay all his debts, there can be no risk or danger in any creditor accepting his debt, because the payment of all his debts cannot operate to prefer any one, and, therefore, there is no one to question the transaction. Besides, the very fact of payment in full proves that he is, so far as the creditors are concerned, solvent. If a debtor has the means of paying all his debts in full, there can be no difficulty about doing it, even if proceedings in bankruptcy are pending against him: and therefore you have a

right to take into consideration the fact that this proceeding is pending against this defendant upon these debts, and draw such inference therefrom as men of ordinary sense would do. In this connection, you may also consider the fact, that the defendant suspended business shortly before the commencement of this action. No particular explanation has been given of this suspension except what appears from the testimony of Mr. Odeneal, the business manager of the defendant. Corporations engaged in the business of publishing newspapers do not usually suspend operations without some reason for it.

It also appears that the newspaper of the defendant was supported for some time—for eight months—by the voluntary contributions of certain persons who were interested in maintaining its existence; and this is a circumstance to be considered by you, and you are to say for yourselves whether a solvent corporation would be supported by voluntary contribution from the outside or not.

Page 45 of a book, which is admitted to be the record or minute of the proceedings of the defendant, has been offered in evidence by the plaintiff to prove that the mortgage executed to Odeneal was authorized by a vote of the directors. This minute or record of the proceedings also contains certain directions concerning the giving of a mortgage and note to Scott, one of the plaintiffs in this case. Counsel for defendant ask you to make an inference from what is therein stated concerning its indebtedness to Scott, and that I instruct you, the entry in this respect is to have the same effect as if it had been introduced by the defendant, which I do. You are to consider this page of this record as evidence before you; and, so far as it tends to prove any disputed fact in the case, you will give it whatever weight you think it is entitled to.

Counsel for defendant also asks me to instruct you, that the voluntary contributions received by the defendant are not debts owing by it, and that the amount of such contributions promised but not paid are to be considered as its assets.

It appears from the evidence, and is admitted in the argument, that between October, 1874, and May, 1875, the defendant received from certain parties four thousand dollars, at the rate of five hundred dollars per month, to enable it to publish its newspaper; that this sum was furnished by these parties in pursuance of a written agreement with one another to that effect; and that when the defendant suspended business, there was behind on said subscription the sum of two thousand dollars, or four months' contributions.

Upon this point I instruct you, that the four thousand dollars, being a voluntary contribution, is not a debt owing by the defendant, and is not to be counted among its debts in ascertaining the question of its insolvency. For the same reason, the two thousand dollars is not a debt due the defendant, and cannot be counted among its assets. The defendant's counsel ask me to instruct you, that this two thousand dollars is a debt due the corporation, because certain parties agreed between themselves to pay it. When it appears that two or three, or more persons agree together upon or for a sufficient consideration to pay a sum of money to a third person—as for instance, this defendant—I am inclined to the opinion, and so instruct you, that the defendant would be entitled to claim performance of the agreement at the hands of either of them, and that the amount, while unpaid, would be a debt due to it. But a mere voluntary agreement between parties to perform such an act, to which the defendant is in no wise a party, I don't think is founded upon a legal consideration, and, therefore, would not raise an indebtedness to the defendant. So far, then, as these contributions are concerned, they are neither assets nor debts. The only effect they can have in this case is upon the question of solvency. The transaction suggests the inquiry, whether it is probable that a solvent corporation would depend upon the voluntary contributions of its friends to carry on its business.

It is now first objected by the defendant, that it does not appear from the petition that the defendant is a "moneyed, business, or commercial corporation;" and, therefore, this

court has not jurisdiction of this action; and I am asked to instruct you on that ground that your verdict must be for the defendant.

The Bankrupt Act, by its terms, only applies to "moneyed, business, or commercial corporations," and does not reach other kinds of corporations, such as charitable, religious, and literary societies.

There is no allegation in the petition that this defendant is "a moneyed, business, or commereial corporation;" but it is suggested by counsel for the plaintiffs that the court must take notice that it is one of these three kinds, because it is alleged to be a private corporation formed under the laws of Oregon, and that no *private* corporation can be formed under such laws but for some such purpose. But the Corporation Law of the State provides for the incorporation of religious, charitable, literary, and other societies, which are, to all intents and purposes, private corporations, in contradistinction to public or municipal corporations, such as counties, cities, etc., which are invested with a portion of the political power of the State for the management of their affairs and the government of those who come within their limits. It may be that the allegation in the petition, that the defendant is a private corporation formed under the laws of Oregon, and that its principal place of *business* is in this county, taken in connection with the fact that the very name of the defendant indicates that it was organized for the purpose of engaging in, and carrying on, the *business* of *publishing* and *printing*, shows sufficiently that it is a business corporation.

But I am not prepared to pass upon the question in this view of it, and refuse the instruction on the ground that the objection comes too late. If the defendant relied upon this matter as a defense to the action, he should have raised the question by his pleading. I think that by answering the petition and not making the objection, it waived it, and admitted that it was such a corporation as might be proceeded against in bankruptcy and adjudged a bankrupt. Deciding this question upon the spur of the moment, I may be mistaken,

but while I have not perfect confidence in the correctness of this conclusion, I instruct for the purposes of this trial, that this action may be maintained notwithstanding this objection.

Take this case then, gentlemen, and find such a verdict thereon as evidence may indicate or satisfy you should be found. Your verdict may be: We, the jury, find for the plaintiffs or defendant, as the case may be.

The jury, after a short absence, returned a verdict for the plaintiffs, upon which an adjudication was afterwards had.

NEW YORK SUPREME COURT—ONEIDA COUNTY.

The Amendment of June 22d, 1874, does not affect a suit to recover a preference which was brought prior to December 1, 1873.

SLAFTER, Assignee, etc., v. *GREER TURNER SUGAR REFINING COMPANY.*

Dennison & Everett, for plaintiff.
W. & J. D. Kernan, for defendant.

MERWIN, J.—This action is brought by the plaintiff, as assignee in bankruptcy of Foot, Doud & Co., to recover for property received by defendant in payment of a debt due to it from the bankrupts. The debt was about two thousand nine hundred and eighty-four dollars, and had accrued prior to December 15, 1871. The payments were made December 19, and December 22, 1871. A petition in bankruptcy was filed against the firm on January 26, 1872, and adjudication thereon, February 7, 1872. This suit was commenced prior to August, 1872, and claimed to recover back the amount of such payment on the ground that it was made in violation of the provisions of the Bankrupt Act, and that the defendant, at the time, had reasonable cause to believe the debtors insolvent, and that the payment was made in fraud of the provisions of the act.

While this action was pending, and on June 22, 1874, the Bankrupt Act was amended, providing in substance, that the creditors recovering the payment must have *knowledge* of the fraud, in order to render the payment void and recoverable back. The question is now whether this action is to be decided upon the law as it stood before the amendment, and when the action was commenced, or as it stands now.

In the bankrupt courts this question has been decided, but not with harmonious results. (*Singer* v. *Sloan*, 12 N. B. R., 208, per Dillon, J.; *Boothe* v. *Brooks, Neely & Co.*, 12 N. B. R., 398, per Hill, J.; *contra*, *Bradbury* v. *Galloway*, 12 N. B. R., 299, per Hillyer, J.; *In re* Montgomery, 12 N. B. R., 321, per Gresham, J.; *Van Dyke* v. *Tinker*, 11 N. B. R., 308, per Longyear, J.; *In re* Foot, MS., per Wallace, J.)

Section 13, of the United States Revised Statutes, provides as follows: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability, incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." This is a re-enactment of the law of 1871. The Revised Statutes were passed June 22, 1874, and the amendment to the Bankrupt Act was passed the same day, but is to have effect as if passed subsequently to the Revised Statutes (Section 5601 of Revised Statutes). The Amendatory Act (Chapter 390, of 1874), contains an express provision affecting liabilities like the one in suit incurred before its passage. It changes the period of four months mentioned in Section 35 to two months, and provides that such provision shall not take effect until two months after the passage of the act. It changes the period of six months in the same section to three, and provides it shall not take effect till three months after its passage. It amends Section 39, as to who may be adjudged bankrupts, and provides that its provisions, as amended, shall apply to all cases of involuntary bankruptcy commenced "since De-

cember 1, 1873, as well as to those commenced hereafter," and the same provision as to "knowledge" on the part of a creditor receiving property, is included in this section as in Section 35. It also provides (Section 17) for composition with creditors in pending cases. These are all the provisions of the Amendatory Act on the subject of pending proceedings, and none of them apply to the present case. It does, however, provide for certain cases arising since December 1, 1873, and the inference may be, perhaps, drawn that all other cases instituted before the act are not intended to be affected.

It is suggested, however, that Section 13 of the Revised Statutes above cited, applies only to cases of repeal and not to cases of modification or supplement, that in the present case nothing is repealed of the old act, but a further condition precedent to a recovery is provided. But does that change the question? The old act, so far as it permitted a recovery upon showing reasonable cause to believe, is abrogated, and a new rule provided affecting the right and the manner of enforcing it. (3 How., United States, 636.) A modification or supplement, so far as it changes, makes something new, and, if it as a whole takes away what would otherwise exist, it so far operates as a repeal. They may repeal in whole or in part; the statute that provides for the greater, provides for the less. The latter would certainly be within the intention of the act as much so as the former, and although in design a penal statute, it should not be construed so strictly as to defeat its obvious intention. (Paige, J., in *Cotheal* v. *Brouwer*, 5 N. Y., 562.)

My opinion is that the provision of the Revised Statutes, Section 13, covers the case, the adjudication having been made and suit commenced before the amended act, and that the rights of these parties must be determined in accordance with the Bankrupt Act before its amendment. That reduces the case mainly to a question of fact.

The payment in question was not made in the usual and ordinary course of business of the debtors, and was, therefore, *prima facie* fraudulent (Section 35 of the Act), and I have no

doubt upon the evidence but that the debtors were at the time insolvent; that the payment was made with a view of giving a preference within the meaning of the act, and that the defendant had reasonable cause to believe the insolvency, and that the payment was made in fraud of the provisions of the act.

The plaintiff is therefore entitled to recover the amount paid by the firm, being two thousand six hundred and eighty-five dollars and seventy-nine cents, with interest from the time of the demand, being the commencement of the suit, which I infer was about August 1, 1872, and judgment is ordered accordingly.

UNITED STATES CIRCUIT COURT—E. D. MICHIGAN.

The Circuit Court has no jurisdiction of a bill of equity filed by creditors before the appointment of an assignee to restrain a chattel mortgagee in possession, from disposing of the goods of an alleged bankrupt. It would appear that the District Court has such jurisdiction.

WALDO M. JOHNSON et al. v. *JAMES E. PRICE.*

THIS was a bill filed by complainants, as Trustees of John M. Potter, a bankrupt, against the defendant, to restrain him from selling a stock of goods of the bankrupt, claimed to be held under a chattel mortgage; and also praying that he be decreed to account for the goods to the assignee, when appointed. The defendant demurred to the bill for want of jurisdiction.

Mr. Don M. Dickinson, for defendant.

Mr. H. E. Bowen, for complainant.

BROWN, J.—If there is any jurisdiction in the Circuit Court to entertain this bill, it is conferred by Section 4979 of the Revised Statutes, which provides "That the several Circuit Courts shall have, within each district, concurrent jurisdiction with the District Court, * * * of all suits

at law and in equity, brought by an assignee in bankruptcy, against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to, or vested in, such assignee." This bill being brought by creditors of the bankrupt, and not by the assignee, is clearly not within the letter of the section. Although bills of this kind have, in a few cases, been entertained by the Circuit Court, I find no case where the question of jurisdiction was raised and decided in favor of such jurisdiction. The question was not alluded to by the court, in the case of *Hood* v. *Karper*, 5 N. B. R., 358, relied upon by complainants' counsel in this case. On the other hand, the intimations of the Supreme Court, in two or three cases, have been decidedly adverse to such jurisdiction.

In the case of *Morgan* v. *Thornhill*, 5 N. B. R. 1, 11 Wall., 65, the Supreme Court observed: "Controversies, in order that they may be cognizable, under that clause of Section 4979, either in the Circuit Court or District Court, must have respect to some property or rights of property of the bankrupt, transferable to, or vested in, such assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause, and against the other." Similar language is used by the same court in *Smith* v. *Mason*, 6 N. B. R. 1, 14 Wal., 419, 431; and also by the judge who delivered the opinions in these cases in *Knight* v. *Cheney*, 5 N. B. R., 305.

As suits of this nature have been frequently entertained by creditors before the appointment of the assignee; and as it has been held, in at least two cases, by the Supreme Court that such suits must be plenary in their character, I had at first some doubt as to whether a denial of jurisdiction in this case would not virtually deprive the creditors of the power of instituting any suit of this kind. Upon careful examination of the Statute, however, I am satisfied that Section 4979 was not intended to limit the jurisdiction of the District Court, and that such jurisdiction is conferred by Section 4972. This section is very general in its character, and pro-

vides that the jurisdiction conferred upon the District Courts as courts of bankruptcy, shall extend to almost every controversy respecting the collection, distribution, and settlement of the bankrupt's estate. No method is pointed out how this jurisdiction shall be exercised; and although it is more frequently, perhaps, exercised in a summary way, I see no objection whatever to a plenary suit at law or in equity. In the case of *Alexander*, 3 N. B. R., 29, Mr. Chief Justice Chase intimates that, although no jurisdiction of cases at law or in equity is expressly given to the District Court elsewhere than in the third clause of the second section, it may well enough be held to be included in the general grant of the first section (4972). See also in *In re* New York Kerosene Oil Co., 3 N. B. R., 125; *Jones* v. *Leech*, 1 N. B. R., 595; *In re* Fendley, 10 N. B. R., 250.

In this last case, the petitioning creditors filed a bill to restrain the disposal of property, on the ground of fraudulent transfer by the alleged bankrupt; and it was held that, under the provisions of the act, the District Court had jurisdiction both in law and in equity, and the motion to dismiss was denied. (*Sherman* v. *Bingham*, 7 N. B. R., 490; *Goodall* v. *Tuttle*, 7 N. B. R., 193.

In this case, the court remarks: "The second section does not profess or attempt to confer or regulate the jurisdiction of District Courts. That relates exclusively to Circuit Courts; but it may with propriety be said to assume the existence of this jurisdiction in the District Courts.

I think the proceedings in this case should have been taken by bill in the District Court, and the demurrer must be sustained, and the bill dismissed for want of jurisdiction.

UNITED STATES DISTRICT COURT—W. D. OHIO.

A deposition to an act of bankruptcy consisting of a fraudulent conveyance, must allege or show the fraudulent intent of the debtor in making the conveyance.

Cunningham v. Cady.

A deposition to a proof of a claim in involuntary bankruptcy must show whether the claim is secured or unsecured.
A petition will not be dismissed, because the depositions in support thereof are defective; but the petitioning creditor, on motion, will be allowed to file supplemental depositions.
When the depositions are defective, the order to show cause will be set aside, but a new order may be issued on supplemental depositions.

JOHN CUNNINGHAM v. *ALSON CADY.*

WALKER, J.—On the 8th of January, 1876, John Cunningham filed in this court his petition against said Cady, debtor, containing the necessary allegations required by the Bankrupt Act, and duly verified. Depositions were also presented in support of the allegations of the petition, and filed with the same. Thereupon an order to show cause was made against the debtor, and served on him as required by the act.

The debtor, by his counsel, now moves the court to dismiss the petition and proceedings for the following reasons:

First. That the deposition in proof of the act of bankruptcy charged is insufficient in law.

Second. That the deposition in proof of the petitioner's claim against the debtor is also insufficient in law.

The first insufficiency complained of is: that while the deposition sets forth the fact of a conveyance by the debtor of his property to his father-in-law, it fails to show or allege that it was done with an intent of a fraudulent nature under the provisions of the Bankrupt Law. The second insufficiency alleged is: that the deposition in support of the petitioner's claim, fails to show whether the claim is secured or unsecured; or if secured, to what extent—whether it is not wholly secured —so that the court can judge of the amount provable.

As to the act of bankruptcy, the deposition is defective in failing to allege or show fraudulent intent of the debtor in making the conveyance. But as to the second specification of the motion, the petitioning creditor insists that the proof is sufficient; that he need not prove that his claim was not secured; that if he were so secured, the fact should have been pleaded in an answer and not by preliminary motion.

There is some authority for holding that, unless it appears that the claim is fully secured, it is still a provable claim under a proper interpretation of the Bankrupt Law. But without undertaking to determine that question, it is sufficient to say, that it is the better practice to set out in the deposition all the material facts concerning the claim; in other words, to "give a particular description of the debt," as prescribed in the form given by the Supreme Court.

It follows that, owing to the defects of the proofs, they must be amended before the debtor can be required to answer the petition; and that the order to show cause was improvidently issued. The question now arises, whether the debtor's motion to dismiss the petition, and the whole proceedings, on that account, shall be allowed. At this stage of the matter, the petitioning creditor interposes his motion for leave to file further and supplemental depositions in proof of his debt, and of the act of bankruptcy in support of his motion.

I think this motion should be allowed for the following reasons:

The jurisdiction of the court over the subject-matter of the proceeding is acquired by the filing of a petition framed and verified in accordance with the provisions of the act, and the rights and liabilities of all the parties relate and are determined by the time at which the petition is filed. On the filing of the petition, it is provided by the act that, "if it shall appear that sufficient grounds exist therefor," an order to show cause shall be entered against the debtor, etc. How the sufficient "grounds" shall be made to appear is not shown in the text of the Statute; and in the absence of any other construction of this portion of the section, it would be naturally inferred that it would be by an inspection of the petition itself. But the Supreme Court has seen fit to require proofs of the truth of the principal allegations by separate depositions as a condition precedent to the order to show cause, and in fulfilment of the requirements of the language in question. No defect in the petition is complained of, but the

defect is in a subsequent and incidental matter. That defect may be cured without prejudice to the regularity or the sufficiency of the petition, in the mode proposed by the motion of the petitioner, and thus the rights and liabilities created by the filing of the petition are preserved without any hardship upon the debtor. The petition, and the depositions in support thereof, are not so intimately connected with each other that, if the depositions are defective, the petition must necessarily be dismissed. It may be sustained while the proofs may not be held sufficient.

The order to show cause is set aside at the cost of the petitioner, and he has leave to file supplemental proofs in support of his allegations as to his claim, and as to acts of bankruptcy, on the filing of which, if found sufficient, an alias order to show cause will be entered.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Corporations as well as natural persons have the right to avail themselves of the provisions of the Bankrupt Law pertaining to composition.

In deciding a motion to confirm a resolution of compromise, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution as compared with those who dissent.

A resolution of compromise which is palpably opposed to the best interests of all concerned will not be confirmed.

In re WEBER FURNITURE COMPANY.

On May 17th, 1875, thirteen creditors of the company filed their petition, setting forth certain acts of bankruptcy, and praying that the company might be adjudged a bankrupt. An order to show cause was issued, returnable on the 17th of May, when a denial of bankruptcy and a demand for a trial by jury were interposed. No further proceedings were had on this petition; but on the 25th of June, the company petitioned that an order might be made for a meeting of the creditors to consider a proposal for a composition, under Section 43, as amended by Section 17, of the Act of June 22, 1874. Incompliance with this petition, a meeting of the creditors was ordered, at which it was resolved by a very large majority of the creditors, far exceeding in number and amount the requirements of the act, that it was for the best interests of all concerned to accept twenty cents on the dollar in full satisfaction and discharge of the debts of the company, provided that Bernard Stroh should, by joining in the composition, insure and promise the payment of the sum in cash within fifteen days after the resolution should be recorded.

George Moebs, to whom the company, prior to the proceedings in bankruptcy, had made an assignment of its entire property for the benefit of the creditors, also joined in this composition, and released all his right, title, and interest in the assets of the company, which were to be transferred to

Stroh on payment of such twenty per cent. Henry Weber, manager of the company, and personally bound as indorser upon a large amount of its paper, expressly covenanted that the compromise should not release or affect his liability as such indorser.

On the 23d of July, eleven days after the meeting was held, the Detroit Chair Company, a creditor of the Weber Company, filed with the Register the following objections to the composition:

First. That the Weber Furniture Company is a business corporation, and under the Bankrupt Act cannot be discharged of its debts, and is not entitled to the privileges of the proceedings contemplated by Section 43.

Second. That said company, prior to the filing of the petition for adjudication as a bankrupt, made and delivered an assignment of all its property to George Moebs, as assignee, who accepted the same, for the benefit of all its creditors, share and share alike, and by which all the creditors became rightfully entitled to have such assignment carried out; and such right cannot be defeated by any such proceeding, as is attempted under said Section 43.

Third. That the proposition to pay twenty per cent., when the statement of the assets showed that fifty per cent. will and can be paid, is unjust, and ought not to be considered or accepted.

Certain other objections were filed, but were not urged upon the argument. In all, ten creditors, representing about fifteen thousand five hundred dollars, joined in these and similar objections.

Don M. Dickinson, Alfred Russell, and Ashley Pond, for the motion.

J. W. McGrath, F. H. Canfield, D. C. Holbrook, and *C. I. Walker,* for the objecting creditors.

BROWN, J.—The first objection, that proceedings for a composition cannot be taken by a corporation, is based upon the last clause of Section 5122 of the Revised Statutes,

which provides, that "no allowance or discharge shall be granted to any corporation or joint stock company, or to any person, or officer, or member thereof."

It is claimed that as the composition, when ratified by a sufficient number of votes, operates as a satisfaction of all debts exhibited in the statement of the debtor, it in effect amounts to a discharge, and hence falls within the inhibition contained in Section 5122, above cited. All the other provisions of the act apparently apply as well to corporations as to natural persons. Indeed, Section 5013 declares, that the word "person" shall also include corporations; and the general rule undoubtedly is, that where persons are mentioned in a statute, corporations are included, if they fall within the general design of the act. (Angell & Ames, Section 6, 191; *Commissioners* v. *Bank of Brest*, Harring Ch., 106; *Town* v. *Bank of River Raisin*, 2 Doug., 530.)

The original act provided only for a discharge by order of the court. It is true that Section 43 provided for the superseding of proceedings in bankruptcy by the choice of a trustee, to whom the assignee might transfer the entire property of the bankrupt; but no provision was there made for a composition or satisfaction of debts. Indeed, the section expressly provides that a bankrupt should have a like right to apply for and obtain a discharge after the passing of such resolution, and the appointing of such trustees, as if the resolution had not been passed. By the 17th Section, however, of the Act of June 22, 1874, amending Section 43, an entirely new proceeding is contemplated. The debtor may propose to his creditors a compromise, and such compromise, when obtained, shall be accepted in satisfaction of debts due them from the debtor. Corporations are not expressly excluded from the benefits of this provision. I cannot see that they are excluded by implication. The word "discharge" used in Section 5122 evidently applies to a discharge by order of the court upon a petition of the debtor. This is the only discharge contemplated in the original act.

Seven years thereafter a new provision is engrafted upon

the act, by which the debtor may obtain a satisfaction of his debts by the act of his creditors. I see no reason why this should not apply equally as well to corporations as to natural persons. No express adjudication is found upon this point, although it was found in the case of *Haskell*, 11 N. B. R., 164, that it was not the intention of the statute that no debtor could make a composition with his creditors, who, by reason of preference, or otherwise would not be able to obtain his discharge. This case falls within the general rule in question: that the inability of the debtor to obtain a discharge by order of the court does not preclude his obtaining satisfaction of his debts by way of composition. (4 N. B. R., 437.)

The third objection is substantially, that the composition is not "for the best interests of all concerned," within the meaning of the statute.

From the language of Section 17, of the amended act, I think that to justify the court in confirming the composition, the following facts should be made affirmatively to appear. 1. That a meeting had been called under the direction of the court, and upon not less than ten days' notice to each creditor, of the time, place, and purpose of such meeting. 2. That a resolution has been passed by a majority in number and three fourths in value of the creditors of the debtor, assembled at such meeting, either in person or by proxy. 3. That it has been confirmed by the signatures thereto by the debtor, and two-thirds in number and one-half in value of all the creditors. 4. That notice of the presentation of the resolution has been given to all the creditors of the debtor of not less than five days. 5. That the composition is for the best interests of all concerned. Upon the establishment of these facts, it is the duty of the court to cause such resolution to be recorded, and a statement of the assets and the debts, which the debtor is required to produce at the meeting of the creditors, to be filed.

Upon the argument of this motion much discussion was had upon the question, how far the court was authorized to examine

into the reasonableness of the proposed compromise. Under the former English Bankrupt Act there seems to be some difference of opinion as to the duty of the court in this regard. In the case of *Latham* v. *Lafone* (L. R., 2 Exch., 115), Mr. Chief Baron Keely, in commenting upon composition deeds under the Bankrupt Act, uses the following language: "Looking at the general scope of the enactment, I am of opinion that the intention of the Legislature was to leave to the majority of the creditors the decision of all questions of expediency as to the affairs of the insolvent debtor, but to reserve to the courts of law the determination of the reasonableness of their arrangements. The act has, for the first time, conferred upon a specific majority of the creditors the power to bind the rest by their informally given vote, but the protection of the interests of the remainder is committed to the law, and before we can hold the deed binding upon non-assenting creditors, we must see that it is not unreasonable in the mode in which it affects them." The majority of the court, however, seem to have decided the case upon the ground that the deed in question was not within the purview of the act, and had some doubt as to the opinion of the Chief Baron upon the question of reasonableness.

There is no doubt, however, that where the composition is so unreasonable as to be evidence that the creditors who signed it were actuated by friendly feeling toward the debtor to accept a composition greatly disproportioned to the assets, or where it was apparent that they did not act *bona fide* for the benefit of all the creditors of the debtor, it will not be upheld. See *ex parte* Cowen (L. R., 2 Ch. App., 563). It must be conceded in both these cases that courts of law in dealing with deeds of this description have held that the deeds must be reasonable. See, also, the following cases: *Dingwell* v. *Edwards*, 4 Best & S., 738; *Wells* v. *Hacon*, 5 Best & S., 196; Richmond Hill Hotel Co., L. R. 4 Eq., 566; *ex parte* Nicholson, L. R., 5 Ch. App., 332; *In re* Richmond Hill Hotel Co., L. R., 3 Ch. App., 10; *ex parte* Roots, L. R., 2 Ch. App., 559; *ex parte* Radcliffe Investment Co., L. R., 17

Eq., 121; *ex parte* Dingnan, L. R., 11 Eq., 604; *ex parte* Birmingham Gas Light Co., L. R., 11 Eq., 204; *ex parte* Levy & Co., L. R., 11 Eq., 619; *Bell* v. *Bird*, L. R., 6 Eq., 635.

The recent English Bankrupt Act of 1869 has apparently been construed as taking away from the courts every question, except that of fraud or bad faith in obtaining the compromise. See *ex parte* Linsley, L. R., 9 Ch. App., 290; *Bissell* v. *Jones*, L. R., 4 Q. B., 49. I have not the full text of the English Bankrupt Law before me, but the only power given to the courts seems to be found in the section quoted in *ex parte* Radcliffe Investment Co., L. R., 17 Eq., 124, note, which follows nearly the language of the last clause of Section 17 of the Act of 1874, and enacts that if it appears to the court, on satisfactory evidence, that a composition under the section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings be had accordingly. It does not seem to be necessary that the court should find the compromise to be for the best interests of all concerned, as required by our Act. Hence the English decisions upon the questions of reasonableness do not seem to be applicable here. I find but one American case upon this point: *In re* Whipple, 11 N. B. R., 524, in which it was held by Judge Lowell, that Congress had imposed upon the courts the difficult and delicate responsibility of rejecting a composition, if opposed by a small minority of the creditors, when it is made to appear that a settlement in bankruptcy would be more for their interest. He announced the rule that the judge must make his comparison, not with what the debtor might possibly have done, but rather with what the assignee in bankruptcy could do. I am entirely content with this view of the law, and, indeed, I hardly see how any other construction can be placed upon the words: "Being satisfied that the same is for the best interests of all concerned." It is not unfrequently the case that a small division in cash is hastily accepted by the creditor without a careful examination of the

debtor's condition, especially if his claims be small and the expenses of opposing a composition would be greater than any additional dividend he might receive. Not unfrequently, too, he is actuated by friendly feelings toward the debtor, or by fear that the estate would suffer a material diminution in the Bankruptcy Court, or by the pressing needs of the creditor himself, to whom a small percentage in cash may be of more value than a much larger dividend paid after the lapse of months; but where a composition deed has been signed by a large majority of the creditors upon a full consideration of the condition of the debtor, I should be very reluctant to overrule their judgment simply because I thought the estate would yield a larger dividend in bankruptcy. Much would depend upon the character of the property and the state of the markets. In the case above cited, Judge Lowell intimated "that a difference of five per cent. upon the amount of the debts, and the probable amount of the assets, would not be sufficient to induce me to reject the resolution." I would go even further than that, and say that, where the property consisted of real estate or of goods, the value of which depended upon the caprices of fashion, or other like contingencies, I would not overrule the discretion of the creditors, fairly exercised, if the difference were ten, or even fifteen per cent.

In the case at bar there were seventy-four creditors present at the meeting, in person or by attorney, representing debts to the amount of one hundred and four thousand two hundred and sixty-four dollars and fifty-two cents. The debtor produced at the meeting a statement showing the whole of his debts and assets, and the names and addresses of his creditors to whom said debts respectively were due, and the resolution in question was adopted by a vote of seventy-two creditors, representing one hundred and three thousand four hundred and seventy-six dollars and ninety-six cents, against two, representing seven hundred and eighty-seven dollars and fifty-six cents. It does not appear how many of these creditors were present in person, and how many by attorney; nor is it material to the consideration of

this case. The statement furnished by the debtor at the meeting showed a list of one hundred and sixty-three creditors, representing two hundred and fourteen thousand four hundred and seventy-five dollars and thirty-two cents. Of these, one hundred and sixty-one creditors, representing one hundred and forty-six thousand nine hundred and seventy-nine dollars and seventy-five cents, signed the composition. Of the one hundred and sixty-three creditors, one hundred and thirteen, whose debts exceeded fifty dollars in amount, proved claims in the aggregate sum of one hundred and sixty-seven thousand three hundred and thirty-seven dollars and ten cents; forty-seven creditors, representing an aggregate of sixty-seven thousand four hundred and ninety-five dollars and fifty-seven cents, have either neglected or refused to join in this action; but fourteen of these appear to have proved their debts.

Under ordinary circumstances, had this larger vote in favor of the compromise expressed the personal opinion of each of these one hundred and sixteen creditors, I should have felt constrained to confirm their action, although I might have thought they had erred, and erred widely, in coming to this conclusion. But in determining the reasonableness of a compromise like this, I think it legitimate to inquire how many individual opinions were expressed in favor of it. If, on examination, it were found that a few persons represented a very large number of creditors and a very large amount of claims, I should feel much less reluctant in reviewing their decision, though each vote represented an individual opinion. On examination of this case, it appears that, although one hundred and sixteen creditors have signed this composition, eighty-eight of them were represented by four attorneys, so that there were in fact but thirty-two individuals whose presumed opinion was expressed in favor of this compromise. As there were forty-seven non-assenting creditors, supposing each to have expressed his opinion in the case, there is actually a large majority who have pronounced against it.

Again, in the case of *ex-parte* Cowan, above cited, it was held a proper subject of comment, that certain of the creditors were actuated by feelings of charity and benevolence toward the debtor, and certain others were related to him by marriage. Indeed, I think the court may take into consideration any fact tending to show that the creditor was influenced by friendly feelings, or by any other motives than those which usually actuate creditors in endeavoring to make the best terms with a debtor to whose personal responsibility they have trusted.

I find in this case, that Mr. Dickinson, attorney for twenty-seven creditors, acted as solicitor for the debtor, and filed a denial of bankruptcy and a demand for a trial by jury. He appears also, by one of the depositions on file, to have been retained to defend several suits brought up against the company in the common law courts. While it is entirely probable that his retainer by the company in these matters may have familiarized him with its affairs, and enabled him to form a juster estimate of the amount it was able to pay by way of compromise, it is also possible it may have somewhat prejudiced him in forming his judgment as to the propriety of such compromise. Occupying these apparently antagonistic positions, it cannot be expected that the court will give weight to his judgment, to which, under other circumstances, it would be justly entitled.

Mr. George F. Marks, attorney for twenty creditors, appears, by his deposition in proof of a personal debt, to have been general foreman for the Furniture Company for ten months prior to the destruction of its manufactory by fire. While imputing no bad faith to him, his position was not that of an ordinary creditor seeking to make the most out of his debtor's assets, and his vote should not be entitled to great weight as to the non-assenting creditors.

Of the twenty-eight creditors not represented by either of these four attorneys, twenty-two signed the composition in person. Of these twenty-two, however, but four held claims exceeding three hundred and fifty dollars in amount.

One of these was the firm of George Moebs & Co., representing a debt of twenty thousand and one dollars and fifty-six cents. Not only is the head of this firm, George Moebs, the common law assignee of the Furniture Company, but the note representing the debt of his firm is secured by indorsement of Mr. Stroh, the person to whom it is proposed, by this composition, to turn over the entire assets of the company. Mr. Dickinson, who represents a claim of seven hundred dollars, is, as has already been observed, the solicitor for the debtor in this case. Philip H. Marks, who has proved a claim of nine thousand three hundred and five dollars, is also secured to the amount of eight thousand dollars by the indorsement of Mr. Stroh. The fourth creditor who signed in person, is the firm of Holmes & Co., representing seven thousand three hundred and sixty-five dollars and thirty-six cents. This claim is apparently subject to no comment. The remaining eighteen creditors represent but two thousand three hundred and ninety-eight dollars and thirty-eight cents, an average of one hundred and thirty-two dollars and ninety-six cents; a very small amount compared with the aggregate of the assenting creditors, and particularly small as compared with the amounts represented by the four attorneys already referred to. Mr. Russell, attorney for thirty-five creditors, represents fifty thousand nine hundred and six dollars and eighty-five cents, an average of one thousand seven hundred and forty dollars and nineteen cents. Mr. Dickinson, the attorney for the twenty-seven creditors, represents twenty-two thousand eight hundred and ninety-five dollars and ninety-four cents, an average of eight hundred and forty-seven dollars and ninety cents. Mr. Somers, attorney for six creditors, represents five thousand nine hundred and ninety-seven dollars and fifty-two cents, an average of nine hundred and ninety-nine dollars and fifty-eight cents. Mr. Marks, the fourth attorney, represents twenty creditors, an average of but one hundred and seventeen dollars and thirty-eight cents. His claims, however, appear to be those of the employees of the company. These four attorneys,

therefore, represent eighty-two thousand one hundred and forty-eight dollars and two cents out of one hundred and forty-six thousand eight hundred and seventy-nine dollars and seventy-eight cents.

Some stress was also laid upon the fact that the Detroit Savings Bank, a wealthy local corporation, a creditor to the amount of fourteen thousand two hundred and seventy-five dollars and thirty-five cents, had assented to this compromise. I find, however, on examination of its proof of debt, that it is represented by notes secured by the personal obligation of Henry Weber, and by collaterals deposited by Weber to secure the performance of this obligation, and that out of these collaterals, before the proof of debt in question, there had already been realized about ten thousand dollars.

I have alluded to these facts, not to show that there is any irregularity or invalidity in the adoption of this compromise, but simply to prove that there is not that preponderance of unbiased individual judgment, which, at first blush, the figures would seem to indicate.

I proceed now to inquire how this discretion has been exercised. At a meeting of the creditors called to consider the propriety of adopting a compromise, the debtor submitted a statement of its assets, substantially as follows:

Merchandise	$44,179 07
Accounts and Notes, good	14,197 43
Accounts and Notes, doubtful	19,297 27
Accounts and Notes, claiming offsets	4,123 20
Accounts and Notes collected by H. Weber that should be charged to him	6,803 25
Accounts and Notes, worthless	893 67
Entered as profit and loss in 1874	46,653 04
Real estate, consisting of vacant lots and wild lands in different parts of the State	9,922 34

Insurance on the manufactory of the corporation and its contents, which, just prior to the assignment, had been destroyed by fire	$68,500 00
Horses	310 00
Tools	387 02
Cash	183 93

The amount of debts stated in its schedule, filed at the same time, is about two hundred and fifteen thousand dollars, as above stated. Now, assuming that the figures above given represent the actual value of the property, it will be seen that the merchandise alone will pay the twenty per cent. offered by way of compromise; that the insurance alone would pay a dividend of about thirty-two per cent. The probable dividend which an assignee in bankruptcy would realize is shown by the following estimate to be nearly forty-eight per cent. If the estimate placed by the debtor upon its assets be correct, the estate ought to realize for its creditors from forty to forty-five per cent.:

ASSETS.

Merchandise as per inventory	$44,179 07
Assets and Notes, good	14,197 43
Assets and Notes, doubtful; at fifty per cent	9,648 63
Assets and Notes collected by Weber	6,803 25
Real estate	9,922 34
Insurance	68,500 00
Horses	310 00
Tools	387 02
Cash	183 93
	$154,131 67

In re Weber Furniture Co.

DEDUCTIONS.

Assets carried forward.....		$154,131 67
Profit and loss account....	$46,653 84	
Paid workmen since petition filed.....	4,275 39	
Premiums on insurance....	661 50	51,590 73
Net assets.....		$102,540 94

But it is claimed that the court cannot assume that the amounts set opposite these respective items represent the actual value of the assets in question, but simply their face value; but the term "face value" is evidently inapplicable to any items except the accounts and notes and the insurance. With reference to the accounts and notes, the debtor has expressly excluded this construction by classifying them as "good," "doubtful," "claiming offsets," and "worthless." I can put no other construction upon the word "good," except that in the opinion of the debtor such accounts and notes are good for their face. In making my calculations, I have estimated the doubtful as worth fifty per cent on their face value, perhaps as reasonable a construction as could be given to this word. I have left out of consideration entirely those pronounced worthless, as well as those to which offsets are claimed. The merchandise is valued as per inventory, and it was suggested that it is usual to inventory at cost, and that the court could not presume that the furniture would realize at a forced sale as much as this; but it must be borne in mind that the company was itself a manufacturer of furniture; that its business was to manufacture at a profit, and, if there is any presumption about it, it would be that it would realize more than the actual cost of manufacture.

I can put no other construction upon the figures set opposite the items of real estate, except that this is the value of the real estate in the estimation of the debtor. I think I must assume that the item of sixty-three thousand five hundred dollars insurance, represents the face of the policies held by the company upon its manufactory. It was hinted

that the companies claimed a defense to these policies upon the ground that Mr. Weber had himself set fire to the manufactory in question. Nothing of this kind appears in the record. It does not even appear that the companies have refused to pay, or that payment has been demanded. Even if suits had been commenced, and a defense pleaded by the companies, I do not see that the court could assume that these defenses were good, and that the policies were absolutely worthless, when the suits may possibly have been collusive, and the defenses interposed for the very purpose of leading the creditors to believe the insurance could not be collected. In the affidavit annexed to this statement, Mr. Weber swears the statement of assets is a true statement of such assets, and that the different items thereof were truly characterized in such statement. If the figures set opposite these respective items represent anything at all, they represent the value placed by the debtor upon the items in question, and it is highly improbable that in seeking a compromise with its creditors it would overestimate the value of the assets from which these creditors were to realize their claims.

While I have no doubt that it is sufficient *prima facie* evidence that the composition is for the best interest of all concerned, to show that the requisite majority of creditors have accepted, and that the burden of proof is then thrown upon the dissenting creditors, still, where the record shows upon its face, by the debtor's own statement, that his estate is able to pay a much larger dividend, I think the dissenting creditors may rely upon this statement, and are not bound to prove the facts by affidavits, which would only corroborate it. If the debtor's statement underestimates the value of his property, the creditors may prove the fact by affidavits, or, perhaps, may take a reference to the Register; but they are not compelled to do so, if they are content, as in this case, to accept the debtor's statement as true.

How this compromise was able to obtain the large vote it did, I am unable to understand. Certainly it could not have

been by the statements apparent upon this record, or by the arguments made upon the hearing of this motion. Upon the face of this record, as it is laid before me, I have no hesitation in pronouncing against this composition.

My conclusion upon this point renders it unnecessary to consider the very difficult questions arising under the second objection. An order will be entered denying the motion to confirm and record the composition.

SUPREME COURT—PENNSYLVANIA.

MARCH 26, 1874.

Under the laws of Pennsylvania, a landlord is entitled to a lien for rent if an execution is issued before the commencement of the proceedings in bankruptcy, although the levy was not made nor a notice given to the sheriff until after that time.

BARNES'S APPEAL.

BEFORE Agnew, C. J., Sharswood, Mercur, and Gordon, JJ., Williams, J., at *Nisi Prius*. Appeal by A. H. Barnes, assignee in bankruptcy of George H. Williams, from the Court of Common Pleas of Warren County: of January Term, 1874, No. 283. In the distribution of the proceeds of the sheriff's sale of the personal property of Williams. On the 2d of July, 1873, Samuel P. Johnson obtained a judgment in the Court of Common Pleas of Warren County, against Williams, who was then a tenant of E. N. Lacy of a mill property. On the same day, an execution was issued on this judgment; the writ went into the sheriff's hands on the same day. On the 26th of July, Williams filed a petition to be declared a bankrupt, and on the same day he was adjudged a bankrupt. On the 29th of July, a levy under Johnson's execution was made on personal property on the leased premises, and on the same day Lacy notified the sheriff that he claimed to receive from the sale six hundred and thirty dollars and eighty-one cents, the amount of rent due him. On the

6th of August the goods were sold by the sheriff, and after payment of Johnson's execution, there remained six hundred and forty-two dollars and fourteen cents, which was brought into court on the 23d of August; and, September 8th, I. S. Alden, Esq., was appointed auditor to report distribution. On the 22d of September, A. H. Barnes was appointed assignee in bankruptcy of Williams. The auditor, after deducting the expense of the audit, awarded the remainder to Lacy, the landlord, in payment of his rent. Barnes, among other exceptions, filed the following to the report of the auditor: 3. The auditor erred in finding that the rent due E. N. Lacy from George H. Williams, at time of levy in the above case, was a lien on the property sold by virtue of the writ, found on the demised premises; such a lien as was not affected by the proceedings in bankruptcy of George H. Williams. 4. The auditor erred in finding that E. N. Lacy is entitled to the fund now in court against the assignee of the estate of George H. Williams, bankrupt, for the reason that on the 26th day of July, 1873, the time when the said Williams was declared bankrupt, Lacy had no such lien as gave him the right to the fund realized from the sale of property levied upon July 29th, 1873, upon which day notice was first served upon the sheriff by Lacy to retain the amount due him, etc., as per notice filed with report. The Court of Common Pleas (Vincent, J.) overruled the exceptions, and decreed distribution in accordance with the auditor's report. Barnes appealed to the Supreme Court, and assigned the decree of distribution for error.

G. Reeves, for appellant.—If Lacy had no lien when the proceedings in bankruptcy commenced, he could acquire no preference afterwards. (*In re* Wynne, 4 N. B. R., 23; Bump on Bankruptcy, 186.) A landlord has no lien independently of the Act of June 16, 1836, Sections 83, 85. (Pamph. L., 777; 1 Br. Purd., 645, 646, pl. 51, 53; *Sands* v. *Smith*, 3 W. & S., 1, 13.) A landlord has no lien by virtue of his lease. (*Singerly* v. *Fox*, 75 Penn., 112.) "*Taken by virtue of an execution*" means levied on. (*Hoskins* v. *Houston*, 4 Penn.

L. J., 276; *Wickey* v. *Eyster*, 58 Penn., 501; Parker's Appeal, 5 Penn., 390; *Case* v. *Davis*, 15 Penn., 80.)

J. R. Clark, for appellee.—The property sold was subject to distress for rent; this right was incident to the lease. (3 Bl. Com., 6, note.) As long as goods remain on the demised premises the landlord will have the right to distrain, notwithstanding the bankruptcy of his lessee or tenant, and may realize all the arrears due under such distress. (*Ex parte* Burly, 22 L. J. Bank., 26; James on Bankruptcy, 93; *Butler* v. *Morgan*, 8 W. & S., 53; *Ex parte* Plummer, 1 Atk., 103.)

CHIEF-JUSTICE AGNEW delivered the opinion of the court, April 2d, 1874. The effect of the 83d, 84th, and 85th Sections of the Act of 16th June, 1836, is to create a charge in favor of the landlord for rent not exceeding one year's, upon the goods liable to the distress of the landlord for this rent, in and upon the demised premises at the time of taking such goods in execution. After the sale the officer is required to pay the rent first out of the proceeds and apply the surplus only to the execution, and in case of the insufficiency of the proceeds to pay the rent and all the costs; the same costs only shall be allowed as would have to be paid in case of a sale under distress. Moreover, after a levy on goods liable to distress, the plaintiff in the execution cannot stay proceedings without the consent of the landlord first had in writing. Thus, call the charge a lien, or by any other name, it is clear the rent of the landlord is a prior charge by law, and the sale under execution is for the benefit of the landlord. Whenever, therefore, the writ of execution will carry a valid sale over the head of the assignee in bankruptcy, it is evident it carries with it the landlord's claim for his rent. The State law makes it a valid charge prior to the right of the execution-creditor, so that his precedence over the assignee in bankruptcy necessarily lifts up the precedent rent above him also.

Decree affirmed with costs, and appeal dismissed.

UNITED STATES SUPREME COURT.

The commencement of proceedings in bankruptcy does not affect the jurisdiction of a State court over a proceeding then pending to foreclose a mortgage, and a sale thereunder will pass a valid title, although the assignee is not made a party thereto. The Bankrupt Act does not divest State courts of jurisdiction over actions involving the right to real or personal property of the bankrupt, or debts owing to his estate.

CHRISTIAN S. EYSTER v. *THOMAS GAFF AND JAMES W. GAFF.*

IN error to the Supreme Court of the Territory of Colorado.

MILLER, J.—This suit was an action of ejectment brought originally by Thomas and James Gaff against plaintiff in error in the District Court of Arrapahoe county, Colorado, in which the plaintiffs below had a recovery, and that judgment was affirmed on appeal by the Supreme Court of that territory.

The title to certain lots in Denver city is the subject of controversy, and there seems to be no difficulty in considering George W. McClure as the source of title, common to plaintiffs and defendant. McClure had made a mortgage on the lots to defendants in error to secure payment of the sum of eighteen thousand dollars.

A suit to foreclose this mortgage was instituted in the District Court in 1868, which proceeded to a decree and sale, and plaintiffs became the purchasers, receiving the master's deed, which was duly confirmed by the court.

This decree was rendered July 1, 1870. On the 9th day of May preceding, the mortgagor, McClure, filed a petition in bankruptcy, and on the 11th day of May he was adjudged a bankrupt, and on the 4th day of June, John Mechling was duly appointed assignee. The bankrupt filed schedules in which these lots and the mortgage of the Gaffs on them were set out. It will thus be seen that, pending the foreclosure proceedings which had been instituted against McClure, he had been declared a bankrupt and Mechling had been appointed his assignee, and that the decree of sale and foreclos-

ure under which plaintiffs asserted title in the present suit was rendered about a month after the appointment of the assignee, and nearly two months after the adjudication that McClure was a bankrupt. The defendant in the ejectment suit was a tenant under McClure, and defends his possession on the ground of the invalidity of the foreclosure proceedings after the adjudication of bankruptcy and the appointment of the assignee.

The plaintiffs in this suit seem to have relied at first upon the right to recover under the mortgage, and did not give in evidence the proceedings in foreclosure; but when the defendant had read them, so far as the decree and sale, in order to show that the mortgage was merged, the plaintiffs then produced the master's deed. The Supreme Court of Colorado held that the mortgage alone was sufficient to sustain the action, one of the judges dissenting; and counsel for defendant below insists here that this was error, because the laws of Colorado give to a mortgage only the effect of an equitable lien, and not that of conveying a legal title. He also insists that all the proceedings in the foreclosure suit after the appointment of the assignee in bankruptcy are absolutely void, because he was not made a defendant.

We will consider this latter proposition first, for if the foreclosure proceedings conveyed a valid title to plaintiffs the judgment must be affirmed, whatever may be the true solution of the question of local law.

It may be conceded for the purposes of the present case that the strict legal title to the land did not pass by the mortgage, and that it did pass to the assignee upon his appointment, and consequently, if that title was not divested by the foreclosure proceedings, it was in the assignee at the trial of the ejectment suit. On the other hand, if these proceedings did transfer the legal title to plaintiffs, they were entitled to recover as they did in that action.

At the time that suit was commenced, the mortgagor, McClure, was vested with the title, and was the proper and necessary defendant. Whether any other persons were

proper defendants does not appear, nor is it material to inquire. But for the bankruptcy of McClure there can be no doubt that the sale under the foreclosure decree and the deed of the master would have vested the title in the purchaser, and that this would have related back to the date of the mortgage. Nor can there be any question that, the suit having been commenced against McClure when the title or equity of redemption (no difference which it is) was in him, any person who bought of him or took his title or any interest he had pending the suit, would have been bound by the proceedings and their rights foreclosed by the decree and sale. These are elementary principles. Is there anything in the Bankrupt Law, or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property, acquired by the assignee, out of this rule?

There is certainly no express provision to that effect. It is maintained by counsel that, because the assignee is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on, and it cannot thereafter have the effect of transferring the title which is in a party not before the court. But if this be true in this case, it must be equally true in other suits in which the title is transferred *pendente lite.*

We have already said, and no authority is necessary to sustain the proposition, that a sale and conveyance by the mortgagor pending the suit, would not prevent the court from proceeding with the case without the purchaser, nor affect the title of him who bought under the decree. So, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought, would not suspend the proceeding or defeat the title under the decree of the court. The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers. Another reason is, that when such a suit is ended by a final decree transfer-

ring the title, that title relates back to the date of the instrument on which the suit is based, or to the commencement of the suit, and the court will not permit its judgment or decree to be rendered nugatory by intermediate conveyances.

We see no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding. The Bankrupt Act expressly provides that the assignee may prosecute or defend all suits in which the bankrupt was a party at the time he was adjudged a bankrupt. If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition. If he chose to let the suit proceed without such defense, he stands as any other person would on whom the title had fallen since the suit was commenced.

It is a mistake to suppose that the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.

The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case, it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty, as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with

no plea or motion to be made a party or to take part in the case, deserved no attention and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction; and that other courts can proceed no further in suits of which they had at that time full cognizance. And it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the Bankrupt Court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view.

The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary.

The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee on the Circuit and District Courts of the United Stated, it is concurrent with and does not divest that of the State courts.

These propositions are supported by the following cases decided in this court: *Smith* v. *Mason*, 6 N. B. R., 1; 14 Wall., 419; *Marshall* v. *Knox*, 8 N. B. R. 97; 16 Wall., 551; *Mays* v. *Fritten*, 11 N. B. R., 229; 20 Wall., 414; *Doe* v. *Childress*, 11 N. B. R., 317; 21 Wall., 643. See, also, *Bishop* v. *Johnson*, Wool., 324.

They dispose of this case, the judgment in which is affirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

When the marshal has concluded his services he may have his bill taxed, if there is an assignee, without waiting for the presentation of the final account.

Notice of the taxation may be given to the assignee, and it is not necessary to give notice to the creditors.

The assignee should examine the bill, and if he is satisfied that it is lawfully taxable at a certain amount, he may consent to its being taxed at that amount.

The consent of the assignee is a sufficient warrant for the clerk to tax a bill for the amount so consented to.

When the taxation is made, it is conclusive on the marshal and the assignee for the time being, and the marshal is entitled to receive the amount of his bill so taxed, unless it is shown that there is some fraud or bad faith on the part of the marshal or the assignee.

When the marshal's bill has been taxed by the clerk, the Register should countersign a check therefor.

In re PHILIP REIN.

THE marshal presented to the clerk the following bill for taxation, to wit:

Amended Bill of Fees of Oliver Fiske, U. S. Marshal.

1874.		
Nov. 6.	Serving provisional warrant, and mileage.	$2 20
" 14.	" warrant of seizure, and mileage..	2 20
	" 50 notices of one meeting, at 10c..	5 00
	Copies of notices to newspapers.....	1 00
	Affidavit.....	25
	Paid for publishing notice of first meeting..	9 75
	" George Turney, for services as keeper 20 days, at $2.50.....	50 00
	Paid George Turney, labor in packing and removing goods, 26 hours, at 40c.....	10 40
	Paid Lawrence O'Brien, for labor, etc., 26 hours, at 40c.....	10 40
	Paid Wm. Thomson, for paper and twine..	3 70
		$94 90

In re Philip Rein.

Amount brought forward.	$94 90
Paid Robert Johnson, for packing-cases..	4 50
" Frank Manchester, for labor 24 hours, at 40 cents	9 60
Paid Frank Manchester, services as porter 3 weeks, at $7.00	21 00
Paid E. McEntee, for storage.....	12 00
" E. C. Murphy, cartman.....	7 00
" D. M. Poinier.....	7 00
" The Safe Deposit Co., of New York..	10 00
" George H. Holmes, for labor and services	12 50
Paid Lawrence O'Brien, keeper, 5 days, at $2.50.....	12 50
Paid James Turney, for services.....	100 00
" " " expenses.....	2 00
Commissions on value of property, $500, at 1 per cent.....	5 00
Commissions on value of property, $9,500, at ½ per cent.....	47 50
Commissions on disbursements, $282.35...	5 65
Allowance for taking inventory, 51 hours, at $1.00.....	51 00
Allowance for 114 folios of inventory, at 20c.....	22 80
Allowance for copy of inventory, at 10c...	11 40
Clerks, for taxation, filing orders, etc....	5 00
	$441 35

Appended to the bill was the following consent, to wit:

"I consent that the above bill be taxed at 391\frac{50}{100}$, November 19, 1875.

"MATTHEW V. CABLE,
"*Assignee of* PHILIP REIN."

At the foot of this consent is the clerk's taxation, in the words and figures following:

"Bill of costs taxed at $391\frac{50}{100}$, November 19, 1875.

"GEO. F. BETTS, *Clerk.*"

The marshal then requested the Register to countersign a check for the amount so allowed, but this request was refused. The question was then certified to court. In the certificate the Register uses the following language, to wit:

The statute remains. It still imperatively requires the Register to audit the accounts of the assignee. The fact that the clerk has fixed the amount of this item (marshal's fees) of the assignee's final account, by taxation, at three hundred and ninety-one dollars and fifty cents, under General Order 30, cannot have the effect to repeal that provision of the act, but must be construed in subjection to that provision. Undoubtedly, in most cases of this kind, the provision of the act and General Order may stand together and be construed in harmony the one with the other; but in this case the order itself expressly prohibits the clerk from taxing most of the items of this bill. Is it possible to say that a Register, acting under the provisions of the act above referred to, upon the final audit of the assignee's account, can overrule an objection taken by a creditor to the effect that most of the items of this bill are expressly forbidden to be allowed by the clerk, in this same 30th General Order? If the precedent sought to be established by the judgment of the court in this case shall succeed, what *legal* obstacle can prevent any assignee from bestowing by stipulation, like that above referred to, upon the marshal, the last shilling of the largest estate.

The creditors are not entitled to notice of taxation before the clerk, and can have no knowledge of the assignee's disbursement of the fund till the meeting before the Register, for final audit of his accounts—generally a period of a year, and sometimes, in cases of severe litigation, of several years, after the taxation and payment of the marshal's fees. It would then, generally, be too late for a creditor to review such taxation. Beside, what a farce would be the statutory

provision for auditing the assignee's accounts in the presence of the creditors, if the marshal's fees—which frequently embrace the greater part of the entire expenses of administering the bankrupt's estate—were excluded from that audit.

Here were fifteen items, amounting to three hundred and thirty-nine dollars and eight cents, which, if taxable at all, are allowable only as "actual disbursements," which, in any view, are not subject to the provisions of General Order 30, which is in these words: "No other allowance to be made for custody of property, except for actual disbursements, which shall, in all cases, be passed upon by the court." Although the word "court" often includes the Register, it nowhere includes the clerk—in this General Order it is used in contradistinction to the clerk.

It is, perhaps, proper to suggest that the words, "reserving to any *party interested* exceptions to the bill as taxed, which shall be decided by the court," in General Order 30, may be construed as reserving to creditors from the operation of the previous words ("which taxation shall be conclusive") the right to object, at a final meeting, "to the bill as taxed." And this suggestion derives force from the fact that that is the time fixed for them to be heard, and the only time they have an opportunity of being heard.

This case shows that the assignee *alone* is entitled to be heard, for it was alone upon his stipulation that the amount was taxed. An objection of that character ought certainly to be cognizable by the Register, under the provision of the act requiring him to audit the last accounts of the assignee.

But, whatever be the language of the General Order, the well-established rules of statutory construction forbid it to be construed so as to virtually abrogate the provisions of the statute. No power to do that has been conferred upon the justices.

I again certify and submit to the court that I am entitled to be allowed for services herein, ten dollars for this certificate, in addition to the sum of thirty dollars, claimed in my cer-

tificate herein, bearing date December 18, 1875, and to have the same or such other sum as I may be by law entitled to declared a lien upon, and first payable out of any sum that may be payable from this estate to the marshal.

Respectfully submitted,

I. T. WILLIAMS.

BLATCHFORD, J.—In this case the marshal, under an order of the court made to that end, presented to and filed with the clerk for taxation, a statement of his fees, under General Order No. 30, containing twenty-eight items, amounting in the aggregate to four hundred and forty-one dollars and thirty-five cents. It was accompanied by an affidavit of a deputy marshal as to certain particular items, and to the effect that all the services charged for in the bill were actually performed, as therein stated, and that all the expenses charged in it were actually and necessarily incurred and paid by the marshal, and are just and reasonable. The assignee in bankruptcy had notice, and thereupon consented in writing that the bill be taxed at three hundred and ninety-one dollars and fifty cents, and the clerk taxed it at that amount. The assignee drew a check for the amount to the order of the marshal, which check the Register in charge declined to countersign. The Register, in compliance with an order of the court, has certified his reasons for so declining and his reasons why the judge should not countersign the check.

General Order No. 30 provides that the "clerk shall tax each fee-bill, allowing none but such as are provided for by these rules, which taxation shall be conclusive, reserving to any party interested exceptions to the bills as taxed, which shall be decided by the court."

The Register certifies as a reason for his not countersigning the check, that as he will hereafter be charged with the duty under Section 4998 of auditing the accounts of the assignee, when presented at a meeting of creditors held under Section 5092 or Section 5093, he will then have the right to examine the items of the bill taxed by the clerk, and deter-

mine whether they are properly allowable against the estate so far as the three hundred and ninety-one dollars and fifty cents taxed embraces them; that he is of opinion that some of the items in the bill, which must have been allowed as part of the three hundred and ninety-one dollars and fifty cents, are items not provided for by statute or rule, within the provisions of General Order No. 30, and, therefore, items which the clerk had no power to allow, on taxation; that it cannot be told, from the taxed bill, what items the clerk allowed, as he merely taxed the bill at the gross sum named by the assignee in his written consent; that neither the Register nor the judge ought, by countersigning the check now, to do an act which may deprive the Register of the right to hereafter audit the bill and its items, as part of the accounts of the assignee, and thus put the estate, if the bill should be audited at a less amount than that at which it has been taxed by the clerk, to the expense of recovering back from the marshal the amount overpaid; and that the provision of General Order No. 30, that the taxation by the clerk shall be conclusive, cannot deprive the Register of the power of auditing the accounts of the assignee, given by the statute.

As respects the marshal and his bill, the assignee represents the bankrupt and his estate, and the creditors interested in it. When the marshal has concluded the rendering of his services and desires to have his bill taxed, so that it may be paid, it is proper that it should be taxed, if there be an assignee, without awaiting the presentation of the assignee's final account, which may be long delayed. In such case, notice of taxation is properly given to the assignee, and it is not necessary to give such notice to the creditors. It is the duty of the assignee to examine the bill, and if on such examination he is satisfied that the bill is lawfully taxable at a certain amount, he has a right to consent to its being taxed at that amount. Such consent is a sufficient warrant for the taxing of the bill by the clerk at that amount. The provision in General Order No. 30, that the clerk shall, in taxing any bill thereunder, allow no items or fees but such as are provided

for by the General Orders, imposes upon the clerk no other or greater duty than if such provision were not in the General Order. Every taxing officer is, by virtue of his general duty, required not to allow as taxable any items but such as the law prescribes and allows. But it is the universal practice that a party to a proceeding in a court of justice may bind himself and those he represents by a consent, which the judge or officer may properly adopt as a basis of action, as against the party so consenting and in favor of the other party, where the consent goes merely to the course of proceeding and not to jurisdiction. The question as to what items should be allowed is not a question of jurisdiction. When the taxation is made, it is conclusive as respects the marshal and the assignee, for the present at least, and as respects such present taxation, unless either of them excepts to the taxation. The marshal is not bound to do anything more or to await the auditing of the accounts of the assignee, before becoming entitled to receive the amount of his bill as taxed, unless it be shown to the court that there is some fraud or bad faith on the part of the marshal or of the assignee. The bill is taxed at forty-nine dollars and eighty-five cents less than the sum at which it is made out. I must conclude that, on an examination of it, the assignee came to the conclusion that the taxable items in it amounted to as much as the sum to which he consented. I cannot see on the face of the bill any evidence of any fraud or bad faith on the part of any person. Of the four hundred and forty-one dollars and thirty-five cents charged in the bill, one hundred and fifty-three dollars and seventy-five cents is for various items of services by the marshal in serving warrants and notices and in taking an inventory and for commissions, and two hundred and seventy-two dollars and sixty cents is for disbursements in and about the custody of property, and fifteen dollars is for other disbursements. The affidavit covers the performing of the services and the making of the disbursements. By General Order No. 30, and the statutes in force, it is provided that there shall be certain fees for the services of the marshal

in the custody of property, which fees may extend in certain cases, to an allowance by the hour for the taking of an inventory, and to allowances by the folio for the inventory and for a copy of it, and for commissions on the value of property and on disbursements; and that, besides this, actual disbursements in the custody of property may be allowed, "which shall in all cases be passed upon by the court." Where the disbursements are set out in the bill of fees, and are verified by affidavit, as in this case, presented to the taxing officer, and are assented to by the assignee, they are passed upon by the court, for the purposes of the taxation, if the taxing officer taxes them. The disbursement of one hundred dollars charged as paid to James Turney, the deputy marshal, for services, seems in effect to have been reduced to fifty dollars, which would be for twenty days, at two dollars and fifty cents a day. A like disbursement of fifty dollars is charged in respect of George Turney, as keeper, for twenty days, at two dollars and fifty cents per day. The affidavit of James Turney sets forth that he took possession of the property November 6th, and, besides placing George Turney in charge of it as a keeper, remained in charge of it until November 25th. The other disbursements in respects of custody of property are for labor, paper, twine, packing-cases, services of porter, storage, cartman, use of safe, another keeper for five days, and some small expenses. I see nothing in all this to raise any suspicion of the good faith of the marshal.

How far this taxation may be conclusive hereafter, on the auditing of the assignee's accounts, it is not necessary now to decide. It is conclusive for the present to entitle the marshal to have the check countersigned. If the check shall not be countersigned by the Register within five days after the presentation to the Register of a copy of an order to be entered hereon, the judge will countersign it, on proof of such presentation and that the check has not been countersigned.

I do not see that the Register has any lien on the moneys in the hands of the assignee, and which may be paid out to the marshal on the check in question, for the services of the

Register in making the certificates which he has made in this case.

UNITED STATES CIRCUIT COURT—E. D. MICHIGAN.

When, at a meeting of creditors, the debtor is examined in reference to the value of the assets mentioned in his statement, and the resolution of compromise is regularly passed, under Section 17 of the Act of June 22, 1874, although there is a great apparent discrepancy between the assets contained in the statement and the percentage accepted by the resolution, and other *indicia* of fraud exist, the District Court should not refuse to record it, without giving the debtor and majority creditors full opportunity upon notice and hearing, as provided by the statute, to bring before it all the facts in view of which the latter accepted the compromise.

When one tribunal reviews the judgment of another, or the action of its own subordinate bodies or officers, it should never reverse without having before it all the facts and conditions upon which the decision to be reviewed was based.

The English and American cases upon the authority of the creditors reviewed, and a strong preference expressed for the rule deduced from them, which makes the decision of the majority conclusive as to the *amount* of the compromise, where their judgment is exercised in good faith, and there is nothing to indicate fraud, accident, or mistake.

In re THE WEBER FURNITURE COMPANY.

THIS was a petition in review to reverse the judgment of the District Court refusing to record a resolution of compromise. The record is voluminous, and in order to develop all the points discussed on the argument, the facts would be extensive. There was a wide discrepancy between the compromise offered, and the apparent value of the property. As the sole point decided is that it was error in the District Court to reject the resolution without notice and hearing to the parties, the particular dates and facts presented in the record became immaterial, except as they are stated in the opinion itself.

Don. M. Dickinson for the debtor.

Moore, Canfield & Warner and *D. C. Holbrook* for objecting creditors.

EMMONS, J.—Several questions have been argued at the bar which will not be noticed in this judgment. The only

one decided is whether the District Court erred in refusing to record the resolution of compromise without notice and hearing of the parties concerned, thus bringing before it all the facts upon which the creditors themselves acted before passing judgment upon the papers presented.

That power existed to review the resolution upon its merits, is not questioned. The statute in plain terms authorizes either the rejection of the resolution, when it is presented for record, or its rescission subsequently, if it is prematurely recorded. What we here decide is not that power has been exercised which does not exist, but that it has been exerted without proper proof. The resolution of creditors is adopted at the meeting at which not only the statement filed by the debtor is presented, but the debtor himself is examined at length, giving the creditors all the information which any, even the least of them, desire. This collateral evidence, in a great majority of cases, must be far more important than the statement itself in enabling creditors to judge of the value of the assets. This important feature of the proceeding, and which is that upon which the resolution in many instances must mainly depend, is not in the first instance brought before the court. The statement and resolution is alone presented. The statute provides no mode by which the testimony of the debtor shall be recorded, or, if recorded, can be brought before the District Judge. It is a case coming within that very familiar and universal principle which forbids a court, in reviewing the judgment of another, to reverse for error of any kind, where, in the theory of the proceedings, the facts upon which the inferior tribunal has proceeded are not brought before it. The same principle is applicable where a court reviews the findings of its own subordinate officers. If the facts upon which such officer has passed judgment are not brought before the reviewing tribunal, we know of no exception to the rule that a judgment or finding pronounced is affirmed. The principle goes farther, and in instances where provision is made to carry up the facts for judgment, if in the course of the proceed-

ings it appears that they are not *all* contained in the record, affirmation is the necessary result.

Not because they are any more illustrative than numerous other similar judgments, but for the reason that they are accessible in previously prepared papers, we refer to a few cases, going upon the general principle which we think is disregarded when the court assumes the burdensome and impolitic duty of rejudging in all instances the judgment of the creditors, without having laid before it, as the statute provides, the facts, without which it is a presumption of *law* they would not have acted.

Walker v. *Boston & Maine Railroad*, 57 Mass., 1, was a proceeding to condemn lands for a railroad. The court had power to grant a new trial or *reject the verdict*. It was objected that the record did not affirmatively show that certain conditions, necessary by the statute to give validity to the verdict, had been complied with. At pages 2 and 3, the court say: "If the Court of Common Pleas are called upon to set aside the verdict of a sheriff's jury, on the ground that the respondent had not due notice of the application, the objection cannot be sustained by showing that such notice does not appear by the warrant, the return or the record of the court, for it may, notwithstanding, be proved, by evidence *aliunde*, that the respondent was summoned, or that he consented to take notice without summons, or in fact appeared before the Commissioners." Here the record shows affirmatively that there was an examination and proof in explanation of the statement. The only presumption which is asked is that it was sufficiently full to justify the vote of the creditors.

Flagg v. *City of Worcester*, 62 Mass., 69. Commissioners having issued their warrant, the jury assessed damages for taking lands, and on its return it was objected that it did not appear that any determination by the mayor and aldermen, as required by the statute, had been made so as to authorize the commissioners to issue a warrant for a jury. After saying that an objection could not avail because not

seasonably urged, the court say: "Besides, it well may be taken for granted in ulterior proceedings, in cases of this kind, where the contrary is not shown by the record, that it was made to appear satisfactorily to the commissioners that such determination had been made by the mayor and aldermen. The maxim *Omnia rite acta presumuntur* is applicable." *Martin* v. *Stevens*, 3 Ind., 519. The evidence was not returned. On error the court say: "If any state of proofs might have sustained the charge, it will be presumed right." (*Cullen* v. *Lowery*, 2 Harring, 459.) The court say: "The record shows it is for a school tax. There is one case, and only one, in which the justice had such jurisdiction, and perhaps we ought to presume it was *such* a case rather than the contrary." There was no affirmative proof that it was such a case. And see applying in various forms of proceeding the same general, principle of presumption in favor of the rectitude of proceedings which are being reviewed on error: *McKinney* v. *Pierce*, 5 Ind., 422; *Elder* v. *Robinson*, 2 Ind., 210; *Montgomery* v. *Doe*, 4 Ind., 266; *Wagers* v. *Dickey*, 17 Ohio, 439; *Hicks* v. *Person*, 19 Ohio, 426; *Bankhead* v. *Hubbard*, 14 Ark., 300; *Richardson* v. *Dennison*, 1 Ark., 210; *Stearns* v. *Warner*, 2 Aik., 26; *Kingsley* v. *Bank of State*, 3 Yerg., 107.

In the last case it is said: "The judgment *should clearly have been for* the defendant, if all the testimony was that certified in the record; but, as it does not appear there was no more, it will be presumed there *was* more." It may have been quite clear on the face of the statement in this instance, that the assets would have paid more than twenty cents, but, as is said in the case just cited and its numerous fellow-judgments, the presumption is the omitted testimony was sufficient to explain and overcome it. *Coil* v. *Willis*, 18 Ohio, 28, is a case quite applicable in its reasoning to the case before us. *Clements* v. *Benjamin*, 12 Johns., 299, on *certiorari*. The facts before the court by no means warranted the judgment, but it was held the burden was on the plaintiff in error of showing affirmatively, by procuring a proper return, that there was no additional explanatory proof. We

think in this case the burden was upon the objecting creditors to show the insufficiency of the evidence collateral to the statement given by the debtor. (*Holly* v. *Rathbone*, 8 Johns., 148; *Wilson* v. *Fenner*, 3 Johns., 439; *Kline* v. *Husted*, 3 Cairnes, 275.) Similar adjudications in New York are very numerous. (See also *Wight* v. *Warner*, 1 Doug., 384; *Fleming* v. *Potter*, 14 Ind., 486; *Sharp* v. *Johnson*, 22 Ark., 79; *Long* v. *Rogers*, 19 Ala., 321; *Newberg* v. *Henson*, 12 Cal., 280; *Stockton* v. *Burlington*, 4 Greene (Iowa), 84; *Baily* v. *Clark*, 6 Fla., 516; *Pratt* v. *Miller*, 2 Kans., 192; *Stewart* v. *Wilson*, 5 Dana (Ky.), 50; *Byrne* v. *Riddell*, 2 La. An., 11; *Gray* v. *Howard*, 12 Mich., 171; *Barnsback* v. *Reiner*, 8 Minn., 59; *Anderson* v. *Williams*, 24 Mass., 684: *Raymond* v. *Edgar*, 19 Mo., 32; *Weed* v. *N.Y. R. R. Co.*, 29 N. Y., 616; *Brindle* v. *Brindle*, 50 Pa. St., 387; *Martin* v. *Bank of Tennessee*, 2 Coldw., 332; *Ward* v. *Townsend*, 2 Tenn., 581; *Edmiston* v. *Garrison*, 18 Wis., 594; *Lamb* v. *Grover*, 47 Barb., 317; *Hayes* v. *Haye's Adm.*, 26 Mo., 123; *People, ex rel.* v. *Circuit Court Judge*, 18 Mich., 483.)

This is not the larger portion of judgments we have examined on this subject on a former occasion; reference to them all would serve no useful purpose. There is no department of the law where judgments are more numerous and pointed to a principle, or where they have applied one in more diverse circumstances or more universally. They authorize us to apply it in the case before us, and say that where no fraud appears, the duty is cast upon the objecting creditor to show affirmatively that the resolution of the creditors is unwarranted, and that the court should record it, unless upon notice and hearing it inquires into the testimony, which shows it ought to be rejected.

We should not understand from the judgment of the learned Judge of the District Court that he would at all disagree with these generalities. We should infer that the only difference between his judgment and our own consists in a mere matter of practice. Shall the burden of bringing this additional testimony before the District Court be assumed by

the creditors, whose resolution is to be recorded, or shall the presumption exist that that resolution is right until attacked by those who are interested in showing it to be erroneous? We think a more convenient practice is to extend to those interested the presumption of rightfulness which attends all other judicial and statutory action. We think it would be, in the last degree, inconvenient, if, whenever an apparent discrepancy between the assets and the compromise appears, the court is to be burdened with the duty of re-hearing the testimony and acting as the guardian of those interests which the creditors themselves, in the very nature of the case, are so much more capable of protecting. We cannot assume any such duty upon petitions of review, and think it will lead to ill consequences, if adopted as a practice in the District Court.

We have been favored by full citations of English and American judgments upon this statute. In selecting a portion of these which have been cited and commented upon, in justification of our judgment, we do but little more than reproduce their analysis and consideration from the very able brief of the counsel for the debtor. This efficient aid is sufficiently rare in its occurrence to make our acknowledgment for its presence here not unworthy of mention.

We think the following adjudications upon the English act, precisely like our own, so far as this subject is concerned, differing from it only in the mere practice by which the subject is reached, show that the British courts have uniformly held that in all questions of mere amount, and all conditions, and terms which affect the simple question of policy on the part of the creditors, up to the point where fraud or ill-faith is reached, it is left entirely to the discretion of those who are alone interested in the result. Without being called upon to affirm that this will be accepted as law under our own statute, we think the adjudications there and in this country already pronounced upon the same subject, are coercive to at least this extent—that when a resolution has been regularly passed, and there is nothing before the court but it and the

statement of the debtor under the act, it will, *prima facie*, be held to be good, and that unless there is some feature in it so gross as to excite the suspicion of fraud, it will be affirmed.

In re Radcliffe Investment Company, L. R., 17 Eq., 121, decided in 1873 on appeal to the Bankruptcy Court. Bacon, C. J., in construing that clause of the statute which provides for adding to or varying the original resolution of compromise, and holding that the *persons* who are not to be affected by the amendatory resolution are not *creditors*, discusses with much fullness the powers conferred upon creditors, under the English statute, and says: "Now, the existing statute has made this striking and marked difference in the law of bankruptcy—that all, or nearly all, the powers and authority which were given to the court under the former statutes *are now transferred to the creditors.* They are made the administrators and judges of their own affairs, and they are, under the terms of the statute, bound by the votes of a certain majority at a meeting duly convened. One of the things contemplated by the existing statute is to regard only the interests of creditors, and it is in their interest alone that it provides that it shall be in their power to prefer the acceptance of the composition to the issuing of proceedings in bankruptcy against their debtor, or to resorting to any other legal remedy they may possess." His whole judgment rests largely upon the assumption that the absolute power of binding the minority is conferred upon the majority of creditors. The primary authority is vested in them.

Ex parte Duignan, L. R., 11 Eq., 104, in 1870. The deputy judge had ordered a levying creditor to deliver property to the trustee in liquidation, holding that the same principle applied in such case as in that of an ordinary adjudication in bankruptcy. Affirming this ruling, on appeal, Bacon, C. J., again minutely reviewing these statutory provisions, says: "They hand over to the creditors of insolvents generally an absolute power of determining the manner in which, and the terms upon which the assets of the debtor who is found to be bankrupt, whether in consequence of a hostile proceed-

ing originated by his creditors, or by his own confession, shall be administered and distributed." It is this unlimited power conferred by the statutes which furnishes the key-note for their construction.

Latham *v.* Lafone, L. R., 2 Ex., 115, has been cited at the bar, and is relied upon in the opinion of the learned Judge of the District Court to show, what is not doubted, that power is given by this law to reject or set aside the resolution of compromise. A motion was made to discharge a debtor from arrest because a deed of composition had been signed and registered. The motion was denied. Two judges held the deed unreasonable upon grounds having nothing to do with the mere quantum of money to be paid. The circumstances were so gross as to incline an equal number to base their judgment upon the far better ground that it was not a deed under the statute at all. The judgment has no tendency to show that the court, without collateral facts, will review the decision of creditors as to the percentage they shall receive. This criticism is fully supported by the following language in one of the opinions: "The main object of this section was to enable the creditors to manage their own affairs. It was clearly intended to confer large discretionary powers on the creditors, and we ought to give every effect to that intention. I agree that if the deed is unreasonable to the extent of absurdity we ought not to sanction it, but prudence is so much a relative matter that it becomes very difficult to say conclusively that a deed is unreasonable on this score, where the creditors have said it is reasonable, and, except in cases of inequality, we have no certain test to go by."

In re Cowen, L. R., 2 Ch. Ap., 563, was relied upon for the same purpose as the preceding. Leave was given below to issue execution, notwithstanding a composition by the debtor, under the Act of 1861. Lords Turner and Cairns both rest their judgments upon the ground that the deed was not executed in good faith. There was an expectation of benefit peculiar to the consenting majority, which is expressly pro-

nounced a fraud upon the rights of the others. Among other evidences of ill-faith the circumstances of haste in which the deed was executed, and that there was no examination of the debtor, no evidence of the value of the assets, are referred to. What gives this judgment much weight in favor of the positions taken by the promoters of this bill of review is what is said upon the other point, and which is alone applicable here. Proof having been made in that case that the assets would pay ten, instead of two, shillings in the pound, and this fact being relied upon at the bar to show that the compromise was unreasonable, within the reason of decisions which had held that unreasonable clauses invalidated a deed, Lord Cairns, at page 569, says: "It was much pressed in argument that wherever the court finds the deed to be unreasonable in its provisions it will be treated as invalid, and that it is unreasonable if the amount of composition be not in fair proportion to what the debtor is able to pay. But in my opinion there is a statutory power given to a majority of the creditors to bind the minority. They are made the judges of the propriety of the arrangement so long as they exercise their power *bona fide;* and it certainly seems to me that it would be contrary to the spirit of the act that this court could sit in review on their decision as regards the quantum of composition they may agree to accept. But this is subject to the paramount obligation that this power, like all other powers, must be exercised fairly, so that there may be a *bona fide* bargain between the creditors and the debtor. If it should be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found that there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honorable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the act requires, and would not bind the non-

assenting minority." Lord Turner is equally explicit. It is evident that the last sentence quoted from Lord Cairns, which concedes a deed would be illegal when the majority acted from motives of benevolence, without moral corruption, in no way qualifies the previous doctrine that the mere quantum of payment is solely for the creditors. What is meant is, that where their judgment in good faith is pronounced upon the financial ability of the debtor, the power of the majority is paramount; but where it appears affirmatively that the majority is made up of relatives, warm personal friends of the debtor, or those who have high personal interests in his future prosperity, insomuch as to constitute evidence that they have not performed their duty under the act in deciding what the debtor can pay, but are disqualified from the performance of such duty by their personal relations, their prejudices, or their frauds, then their action will be reviewed. The law in all cases, irrespective of motive, deems such action a fraud.

Ex parte Linsley, L. R., 9 Ch. Ap., 290, reviewing the successive decision of the Deputy Judge and Chief Judge in Bankruptcy, on an application to set aside an order discharging a debtor under a composition, *Held*, That where it quite clearly appeared upon the face of the schedules, by the valuation of the debtor himself and by the sworn testimony of expert valuers, that there was a surplus beyond paying all his debts, and the composition was for fifty cents, that as no fraud appeared and the creditors were not deceived, the objection of the opposing creditors should be overruled, and a compromise resolution affirmed. This judgment would have been well cited by the majority creditors to sustain the resolution in this case had there been a hearing upon notice and evidence in the court below. It is, indeed, a strong one to show the absolute power accorded to the creditors under the British statute, from which ours was taken, where it is exercised in good faith. It is referred to here onl. to suggest that it and its kindred fellow-judgments under the British statute establish a principle which, if followed here, will

at least prevent the rejection of a resolution where nothing whatever appears beyond the written statement and the resolution itself. *Ex parte* Nicholson, L. R., 5 Ch. Ap., 332. The deed provided for the acceptance of the obligation of a third person in discharge of debts, instead of relying on the property of the bankrupt. The British statute does not, like our own, provide that the payment shall be in money. The court, in deciding the deed not unreasonable *arguendo*, repeats the doctrine that the statute confers with much fullness the power of deciding this whole question upon the majority of creditors, and that their decision will not be interfered with so long as bad faith does not appear.

In re Richmond Hill Hotel Company, L. R., 4 Eq., 566. The deed postponed the payment for two years. Motion to restrain the action of a creditor, objection being made that such a deed was unreasonable, the court approving. *Stone* v. *Jellicoe*, 3 H. and C., 263, which held a deed good when the payment was only forty pounds a year, added, "Can I say the delay of payment for two years makes the deed unreasonable? The creditors must judge of that."

Ex parte Roots, L. R., 2 Ch. Ap., 559, was an application for leave to issue execution. The commissioner granted it upon the ground that one deed having failed for non-performance by the debtor, it being succeeded by another of the same amount, and evidence being presented that the assets would pay a much larger sum, the deed was fraudulent. In the Court of Chancery, on appeal, Lord Cairns said: "None of the cases cited warrant the court in holding the deed unreasonable merely for the amount of the composition." The case was sent back for a further investigation as to whether it was fraudulent in fact, the court strongly disapproving the ground of the judgment below, which rested upon certain *indicia* or *prima facie* presumptions of fraud upon the face of the papers. The doctrine of the judgment is quite full to the principle that the question of amount, the terms of the deed, so as they are within the law, are wholly for the majority, and that the onus of proving ill faith is upon those who charge it, and being

charged, that plenary proof will be demanded to sustain it. A suspicious succession of deeds, a wide discrepancy between the assets and the amount to be paid, both existed. The reviewing court conceded they were manifest indicia of fraud; but that they were by no means sufficient without proof *aliunde* to show actual ill faith.

In re Reiman & Friedlander, 13 N. B. R., 128, was an application to record a resolution brought before the Circuit Court on a petition of review. It was objected that the payments were by promissory notes and not in money, and that an item of assets had been omitted from the statement. Justice Hunt several times in the course of his judgment refers to the principle involved in the following quotation from page 132: "He (the debtor) presents a list of the names and amounts of his creditors and of his assets. His creditors consider the subject thus presented, and are authorized to examine the debtor under oath to obtain better or more precise information. The whole matter being thus before them they resolve that their interests require that a compromise shall be made, and that, if the debtor will pay them a certain percentage on their debts, they will accept it in satisfaction, and he shall be discharged. They deliberately resolve, upon an understanding of all the facts, that this is all that his property can be made to pay. Are they not as capable as a court of law of judging on that subject? Some one must decide the question of the amount of the dividend, and of the discharge. Some one must say that the debt of an opposing creditor shall be discharged without payment in full: and the fact that the body of creditors determine the point is no more oppressive to the opposing creditor than if the determination had been made by the court." The precise point was not before Justice Hunt, nor does he refer to the English judgments, but his comments are strikingly like those of the best considered English adjudications upon the subject before us.

In re Haskell, 11 N. B. R., 164. It was objected before Judge Lowell, in opposing the confirmation of a resolution, that the statement made by the debtor was insufficient. In

deciding that a statement made by the bankrupt of his assets might be used for that purpose, he says: "It is true that such a schedule cannot inform creditors of such particulars as will enable them to decide understandingly upon an offer of composition. But what written statement will do this? The law requires the debtor to be present and to answer all inquiries, and the creditors are not bound to act until all such inquiries have been answered, including those by a majority, or by a single creditor, and including a due inspection and explanation of the books.

Ex parte Jewett, 11 N. B. R., 443, was an application before the same judge to confirm a resolution of compromise. It was objected that a creditor was not permitted to examine the debtor and also that the sum to be paid was insufficient. A new meeting was authorized on account of the former error, but speaking of the other objection, that the quantum of payment was insufficient, at page 447, the learned judge says: "Congress has inserted in the statute a clause not found in the English Act, putting upon the court the duty of ascertaining whether the composition will be beneficial to the parties concerned. After the very full discussion at the bar, and nearly two days spent in inquiring into the debtor's assets, every one connected with the case conceded, I believe, that a burden has been cast upon the court that is not easily sustained, of instructing parties concerning their own interests. In the absence of fraud and concealment, the question for the court seems to be, not whether the debtor might have offered more, but whether his estate would pay more in bankruptcy. There can be no other standards, because the court cannot require the debtor to make a second offer; and perhaps ought not to permit him to do so under any circumstances. And as it is established by all experience that a man can make more out of his own assets than assignees of more general capacity than he, and entirely honest, can possibly realize, there is an undoubted margin in many cases which the debtor may save by offering less than he might offer, but more than his creditors can obtain by process of

law. The English statute makes the determination of the creditors final on that point, in the absence of fraud, and I dare say it will be found that the practical administration of our law must be very similar." It is said the practical administration of the American law should be like the English, from which it is taken. It would seem from this quotation that the British acts by express enactment made the decision of the majority conclusive. They do not do so. It is only by sound judicial construction and the unfitness of attempting to rejudge the judgment of creditors when they have all the facts before them, and where there is no fraud, that the courts refuse to interfere upon the mere question of quantum. All which the learned judge means is this, that under the British practice the resolution is entitled to be recorded by the registrar if it is regularly passed. He has no discretion or power to inquire into the merits. If the resolution is to be reviewed it must be done by motion to set it aside, when, under the English practice, precisely the same inquiries are made as are proper under our statute when a motion is made to record the resolution in the District Court. The powers of the creditors are alike in each. So are those of the court. The only difference is that in England it requires a special motion to set aside, while here the question may be raised in opposition to the motion to record.

In view of this statutory and judicial history, English and American, the manifest inconvenience of a contrary practice, and which is well illustrated in the case of Jewett, where two days were consumed by a District Court in dealing with the mere financial question, what we suggest as the true rule is, that when nothing appears to the District Court beyond what would have appeared to the English registrar—the naked statement and resolution—as a nearly universal rule the resolution will be recorded. That if the decision is to be reviewed it must be done by notice and hearing, when the principles applicable to the judgment should be such as we have sought to deduce from the English judgments on motions to set aside. They have our hearty approval as be-

ing consonant with the manifest intention of the statute, and the impossibility of tribunals organized like the District and Circuit Courts supervising with anything like intelligence the honest and regularly exercised judgment of the creditors. We have said that where no evidence *aliunde* the statement and resolution is presented, the resolution as a nearly universal rule should be recorded. The only exception we would recognize is where it manifestly appears there was some fraud, accident, or mistake—such a contingency as would incline the court in any other case of ordinary practice *ex mero motu* to refuse to proceed, and upon notice to all parties concerned, require the exceptional and suspicious circumstances to be explained. That such circumstances did not appear in this case it is not necessary for us to affirm. We think it is sufficient to justify our judgment in authorizing the resolution to be recorded, that even if this did appear, inquiry was not made, but the proceedings adjudged fraudulent upon the mere face of the papers. Upon precedent and principle alike we think this was erroneous.

The judgment of the same court in *In re* Whipple, 11 N. B. R., 524, is in no wise in conflict with our decision. It did, it is true, upon a mere question of how much, refuse to record a resolution of compromise. It was, however, upon full hearing. All the facts were before the court. Whether the American courts ought to assume this duty of supervision to an extent much larger than that exercised in England is not before us for decision. We prefer the rule as there announced, but shall cheerfully acquiesce for the sake of conformity in what shall be the general judgment of coordinate tribunals.

There are some other features in the case which might with propriety be discussed, but we prefer resting our judgment solely upon the error that there was no hearing and evidence outside of the resolution and statement. *Bissel* v. *Jones*, L. R., 4, Q. B., 49, is cited by the petitioners in review in support of that feature of the present compo-

sition which transfers in certain contingencies the property to Stroh. No objection has been made to it by counsel in this court. We see none ourselves, but have not much considered it: and see *Wells* v. *Hacon*, 5 Best & S., 196, and *ex parte* Nicholson, L. R., 5, Ch. Ap., 332.

The fact that a large majority of the creditors assented to the resolution has been earnestly urged by the petitioners in review. We do not deem it material whether great or small. It is only a circumstance which might with others be taken into consideration in a doubtful case, where fraud or gross inadequacy appeared. The fact that many creditors appeared by attorney, referred to in the opinion of the learned District Judge, we do not deem of consequence here. It, too, is but another fact in the mass of evidence which would be necessary to invalidate the resolution. It is explained that the attorneys who signed for the creditors were attorneys in fact, especially authorized in most instances to sign for a precise sum named in the compromise. In such circumstances, where the attorney has but a ministerial duty to perform, there is no incompatibility in the same person appearing as attorney for the debtor upon the record and also as the attorney in fact, authorized to compromise as a special ministerial duty—that of signing the deed of compromise for the sum named in the power of attorney itself.

These matters are referred to here only as illustrative of what we deem at least the better and safer principle, that of rejudging the judgment of the creditors only upon the fullest hearing and consideration of all the testimony. They may all be more or less important when that testimony is fully before the court.

UNITED STATES DISTRICT COURT—N. D. OHIO.

Creditors whose claims are under two hundred and fifty dollars are not to be counted in computing the number who must unite in an involuntary petition, if one-fourth of the creditors whose claims are above that sum join in the petition.

In computing the amount, all the claims must be counted irrespective of the amount.

A party may purchase a claim in good faith, in order to join in an involuntary petition and make the necessary number.

If the sale of a claim is void for fraud or want of consideration, the claim is to be deemed to belong to the assignor.

In re WOODFORD & CHAMBERLAIN.

WELKER, J.—Exception to report of commissioner to whom petition, etc., were referred, to ascertain number and amount of creditors.

Held: First. That in counting the number of creditors necessary to join in the petition, creditors under two hundred and fifty dollars are not to be counted, if one-fourth of the creditors above that sum join in the petition. If such number do not join, then creditors below two hundred and fifty dollars may be counted, to obtain the necessary number.

Second. That in counting the amount of claims of creditors, provable claims in all amounts are to be reckoned, those less than two hundred and fifty dollars as well as over that amount; and the aggregate of the petitioners' debts must be equal to one-third of all the debts provable, irrespective of amounts thereof. The cases *in re* Joseph P. Hadley, 12 N. B. R., 366, decided by Judge Brown; and *in re* J. R. Currier, 12 N. B. R., 68, decided by Judge Lowell, approved and followed.

Third. That a creditor has a right to sell and a party a right to purchase, in good faith, claims against a debtor, with a view to enable the purchaser to join in a petition in bank-

ruptcy, in order to make the necessary number to file a petition.

Fourth. That where a sale of such claims is void for want of consideration or fraud, and is set aside for that reason, the claims so attempted to be sold or transferred go back to the assignor, and in the count are to be reckoned as belonging to the assignor.

Fifth. If such assignee join in the petition, and such assignment is set aside, he is not to be counted in the number necessary to join, nor to be reckoned in the amount of provable debts, but the assignor is to be counted instead if he be a party to the petition, and the amount of such indebtedness reckoned to him—such assignee thereby dropping out of the proceedings as creditor.

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6. A legacy to a wife of a share of the residue of her father's estate, including the proceeds both of land and stocks, directed to be sold, does not constitute a separate estate in the wife, under the Delaware Statute of 1865; and such legacy having been reduced to possession by the husband, a note and check afterwards given by him to his wife for the proceeds thereof, are nullities, and cannot be proved by the wife against the estate of her husband in bankruptcy.—*Canby, Assignee*, v. *McLear*, 23.

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10. The doctrine of the wife's equity to a settlement has no application to a case where the husband has reduced to possession a legacy to the wife, without legal process, and with her assent.—*Ibid.*

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12. The right of a wife to have interposition by bill in equity to prevent her husband from reducing to possession her *chose in action* by proceedings at law—even conceding such right to be established by the authorities—held insufficient to support a promise by the husband, to pay to the wife a sum equal to the proceeds arising from the sale of the wife's legacy, where the promise was made subsequently to its reduction to possession by the husband.—*Ibid.*

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18. Where the assignee petitions for an order that the bankrupt pay over to him the proceeds of a mortgage negotiated two days before filing the petition, *Held*, That the bankrupt was entitled to retain therefrom :

First. The amount paid his counsel for preparing his petition and schedules.

Second. Such amount as the assignee should determine to be necessary for the temporary support of himself and family, not exceeding, with his furniture and other articles, the sum of five hundred dollars ; but that he was not entitled to retain the probable expenses of procuring his discharge.—*In re James Thompson*, 300.

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3. An assignment for the benefit of creditors by an insolvent debtor, is conclusive evidence of an intent to defeat the operation of the Bankrupt Law.—*Jackson, Assignee*, v. *McCulloch et al.*, 283.
4. The trustee and all persons claiming under an assignment for the benefit

of creditors, are chargeable with a knowledge of its terms, and consequently with knowledge of the insolvency of the debtor, and his intent to defeat the operation of the Bankrupt Law.—*Ibid.*

5. An assignment for the benefit of creditors may be set aside at the suit of the assignee.—*Ibid.*

6. An assignment for the benefit of creditors is valid as against a judgment creditor who lays an attachment in the hands of the trustee, for it is not absolutely void.—*Cook et al.*, v. *Rogers, Garnishee*, 97.

7. An assignment for the benefit of creditors, which gives priority to certain creditors, is not void, except as against the assignee in bankruptcy.—*Shryock and Rhodes, Assignees*, v. *Bashore*, 481.

See CONSTITUTIONAL LAW, 5–8.

ATTACHMENT.

1. The provisions of the Bankrupt Law for the dissolution of attachments apply to attachments sued out in State courts.—*Bank of Columbia* v. *Overstreet, etc.*, 154.

2. An attachment issued out of a State court within four months before the commencement of the proceedings in bankruptcy, is dissolved.—*Hatch* v. *Seely*, 380.

3. If an attachment is laid in the hands of a garnishee, prior to the period of four months next preceding the commencement of the proceedings in bankruptcy, it is not dissolved.—*Ibid.*

4. Where an attachment, issued more than four months before the commencement of the proceedings in bankruptcy was dissolved by filing a bond, the bankrupt will not be allowed to file a supplemental answer setting up his discharge.—*Holyoke et al.*, v. *Adams et al.* 413.

5. If property taken under an attachment, issued more than four months before the commencement of the proceedings in bankruptcy, is delivered to a receiptor, the plaintiff is entitled to take a judgment *in rem* and levy the execution upon the money which may be collected from the receiptor.—*Bachelder* v. *Putnaam.*

6. Where a judgment is taken by default without a continuance, and the case is promptly brought forward at the next term, and judgment entered thereon, the lien of the attachment is not lost.—*Rowe* v. *Page*, 366.

7. The delivery of attached property to a receiptor does not divest the lien of an attachment, so long as the property remains in the hands of the receiptor or the debtor.—*Ibid.*

8. The lien of an attachment upon property delivered to a receiptor, follows the property into the hands of the debtor's assignee.—*Ibid.*

9. In an action by a sheriff to recover the value of property subject to an attachment-lien, the defendant cannot interpose a mortgage as a defense, unless it is shown that the property was restored to the mortgagee.—*Ibid.*

10. Where it appears that creditors have taken the real estate of the bankrupts by levy or execution, prior to the filing of the petition in bankruptcy, and under attachments valid as against the assignee, and the

collector of taxes makes proof against the bankrupt estate, for taxes due on such real estate, *Held*, That it would be inequitable to allow the attaching creditors to escape the burden of the taxes on the estate they have acquired under their levy, if the taxes were at the time of the levy allowed and deducted from the valuation made by the appraisers.—*Foster et al., Assignee*, v. *Inglee, Collector*, 289.

See COMPOSITION, 22 ; LIENS, 4.

ATTORNEY.

1. An assignee can only be represented in the proceedings by his duly appointed attorney ; but this does not prevent another attorney from appearing in court as counsel for the assignee in a particular proceeding therein pending, as provided in Section 1000 of the Oregon Civil Code.—*In re C. B. Comstock & Co.*, 193.
2. An attorney who has no authority to appear in a proceeding instituted by the assignee, cannot be heard to question the authority of the attorney who appears in such proceeding as counsel for such assignee.—*Ibid.*

See ASSIGNEE, 18 ; SALE, 2, 3.

BANKERS.—See LIENS, 9.

BANKRUPT.

The right of a party to an alley, the use whereof is reserved to him so long as he shall continue to own an adjoining piece of land, is not terminated by proceedings in bankruptcy which are arranged, and the estate reconveyed to him by the assignee.—*Colie* v. *Jamison*, 1.

See ASSIGNEE, 18 ; EXEMPTION.

BROKERS.—See LIENS, 11, 12.

CERTIFICATE.

1. A witness summoned before the Register on the application of the assignee, to be examined under Section 5087 of the Revised Statutes, is not a "party" to such proceeding, and is therefore not entitled "to take the opinion of the District Judge upon any point or matter arising in the course of such proceeding."—*In re C. B. Comstock & Co.*, 193.
2. A party who seeks to review an act of a Register, must do so in a respectful manner.—*In re Breck & Schermerhorn*, 216.
3. A wanton attack upon the character of a Register in a paper filed before the judge, is a contempt of court.—*Ibid.*

CIRCUIT COURTS.—See JURISDICTION, 4, 5.

COMPOSITION.

1. Corporations, as well as natural persons, have the right to avail themselves of the provisions of the Bankrupt Law pertaining to composition.—*In re Weber Furniture Company*, 529.

2. When a petition for composition is filed, the Register will be directed to give the proper notices to the creditors.—*In re Spades; In re Muir & Foley*, 72.
3. A creditor having personal security, and not security upon the estate of the debtor, is allowed to vote as an unsecured creditor.—*Ibid.*
4. Where a partnership desires a composition, the creditors may make the composition by a general vote and general confirmation, or if one of any class of creditors perceives that the other class is about to force upon him an unjust composition, he may demand a separate vote.—*Ibid.*
5. Creditors whose debts do not exceed fifty dollars are not to be reckoned in determining the number, but are to be reckoned in determining the value.—*Ibid.*
6. Secured creditors are to be allowed to vote as to the excess of the debt above the value of the security, in the same manner as unsecured creditors.—*Ibid.*
7. When the resolution has been definitely passed upon, the business of the meeting is over, and no adjournment is needed.—*In re Benjamin F. Spillman*, 214.
8. A resolution of composition must be confirmed as well as adopted by the requisite proportion.—*In re Spades; In re Muir & Foley*, 72.
9. After the adoption of a resolution, a reasonable time may be given to secure such additional signatures as may be necessary to confirm it.—*Ibid.*
10. The confirmation need not be presented at the meeting of creditors.—*In re Benj. F. Spillman*, 214.
11. No memoranda are necessary in composition cases.—*Ibid.*
12. In deciding a motion to confirm a resolution of compromise, the court will take into account the relations of the creditors favoring the compromise to the debtor, and the relative number of creditors whose individual opinions are expressed in person by the resolution, as compared with those who dissent.—*In re Weber Furniture Company*, 529.
13. A resolution of compromise, which is palpably opposed to the best interests of all concerned, will not be confirmed.—*Ibid.*
14. When, at a meeting of creditors, the debtor is examined in reference to the value of the assets mentioned in his statement, and the resolution of compromise is regularly passed, under Section 17 of the Act of June 22, 1874, although there is a great apparent discrepancy between the assets contained in the statement and the percentage accepted by the resolution, and other *indicia* of fraud exist, the District Court should not refuse to record it, without giving the debtor and majority creditors full opportunity upon notice and hearing, as provided by the statute, to bring before it all the facts in view of which the latter accepted the compromise.—*In re Weber Furniture Company*, 559.
15. When one tribunal reviews the judgment of another, or the action of its own subordinate bodies or officers, it should never reverse, without having before it all the facts and conditions upon which the decision to be reviewed was based.—*Ibid.*
16. The English and American cases upon the authority of the creditors

reviewed, and a strong preference expressed for the rule deduced from them, which makes the decision of the majority conclusive as to the *amount* of the compromise, where their judgment is exercised in good faith, and there is nothing to indicate fraud, accident, or mistake.—*Ibid.*

17. Where there is no fraud or concealment, the omission to place an asset in the statement is no ground for refusing to confirm the composition, if the creditors are fully informed concerning it, and its value does not reasonably require an alteration of the terms of the composition.—*In re Reiman & Freidlander*, 128.
18. The testimony of the debtor, given at the meeting, constitutes a part of his statement.—*Ibid.*
19. A resolution of composition, which provides for payment in indorsed notes is defective, and will not be ratified.—*In re Langdon*, 60.
20. A resolution of composition, which provides for payment in the indorsed notes of the debtor, is valid and may be confirmed, if it can be construed to mean a payment in cash.—*In re James T. Hurst*, 455.
21. A resolution of composition may provide for payment in installments, the postponed payments to be secured by indorsed notes.—*In re Reiman & Friedlander*, 128.
22. The debtor is not discharged under a composition, until the whole amount of the notes given to secure the deferred installments are paid.—*In re Reiman & Friedlander*, 128. *In re James T. Hurst*, 455.
23. After a resolution of composition has been duly adopted and confirmed, the debtor may have an attachment quashed, that has issued against him within four months before the commencement of the proceedings in bankruptcy, for the debt is thereby extinguished.—*Miller* v. *Mackenzie et al.*, 496.

CONSTITUTIONAL LAW.

1. A Bankrupt Law which is not uniform is void.—*In re George T. Duerson*, 183.
2. No law can be uniform which prescribes rules for one State different from those prescribed for another.—*Ibid.*
3. The power of Congress over the subject of bankruptcies is not limited to those laws which were in force in Great Britain and the Colonies, at the time of the Revolution.—*In re Reiman & Friedlander*, 128.
4. Congress has the power to define what, and how much of the debtor's property shall be exempt from the claim of his creditors.—*Ibid.*
5. A State law providing for the distribution of the assets of an insolvent bank is superseded by the Bankrupt Law.—*Shryock & Rhodes, Assignees*, v. *Bashore*, 481.
6. A State law to prevent fraudulent assignments is not an Insolvent Law, and is not superseded by the Bankrupt Law.—*Ebersole & McCarty* v. *Adams, etc.*, 141.
7. An assignment made as a part of the machinery of a State Insolvent Law, and deriving all its validity and efficacy from the Statute, is void.—*Shryock and Rhodes, Assignees*, v. *Bashore*, 481. *Rowe* v. *Page*, 366.

8. Whether an assignment in proceedings under a State Insolvent Law is void, is a question that may be raised in a collateral action.—*Ibid.*

See FEES 1, 2.

CORPORATIONS.

1. Only such portions of the Bankrupt Law as are expressly or impliedly adopted by the section relating to corporations are applicable to them. —*New Lamp Chimney Co.* v. *Ansonia Brass and Copper Co.*, 385.

2. The fact that a State court had, prior to the filing of the petition, acquired jurisdiction over a corporation in a suit commenced therein for the purpose of distributing its estate as an insolvent corporation, and a receiver appointed therein, is no ground for dismissing a petition for an adjudication of bankruptcy filed against it.—*In re Greenpond Railroad Co.*, 118.

3. Whether the president of a corporation is duly authorized to file a petition on its behalf, is a question of fact to be determined by the District Court.—*New Lamp Chimney Co.* v. *Ansonia Brass and Copper Co.*, 385.

4. The District Court may direct the payment of the balance due on subscriptions, although the balance on the certificate of stock is made subject to the call of the directors, under the instructions of the stockholders.—*Sanger* v. *Upton, Assignee*, 226.

5. It is not necessary that the stockholders shall be before the court when an order is made directing the payment of the balance due on subscriptions.—*Ibid.*

6. An order of the District Court, directing the payment of the balance due on subscriptions, is conclusive as to the right of the assignee to bring suit therefor.—*Ibid.*

7. A stockholder cannot, in a collateral action, question the validity of an order directing the payment of the balance due on subscriptions.—*Sanger* v. *Upton*, 226. *Mitchener* v. *Payson*, 49.

8. The order of assessment by the court does not bind the maker as to the validity of the note—his defense to the note can be heard when action is brought upon it.—*Lamb, Assignee*, v. *Lamb*, 17.

9. If a stockholder, at the time of subscribing for stock, pays only a part of the regular price, a representation that there is no personal liability for the balance is immaterial.—*Upton, Assignee*, v. *Tribilcock*, 171.

10. The words "non-assessable," on the face of a certificate, do not release the holder from liability for the balance that remains due and unpaid thereon.—*Ibid.*

11. If the charter and by-laws were placed in the hands of a party before he subscribed to stock, he is bound thereby, although he did not read them.—*Ibid.*

12. A misrepresentation as to the legal effect of a charter which was at the time in the hands of the subscriber, will not release him from liability on his subscription.—*Ibid.*

13. A party who pays for stock in part and receives a certificate in blank therefor, is liable for the balance due thereon.—*Sanger* v. *Upton, Assignee*, 226.

14. A contract to take stock in a corporation, induced by fraudulent representations on the part of the directors and officers of the corporation, is not void, but only voidable at the option of the stockholder.—*Farrar* v. *Walker, Assignee, etc.*, 82.

15. Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation to take stock in the corporation two years before its bankruptcy, for which he gave in payment his note secured by deed of trust on real estate, and during that period made no inquiry as to the true condition of the corporation, but suffered his note to be held out to the public as an asset of the corporation—the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the note.—*Ibid.*

16. A State allowing a foreign corporation to do business within its limits may impose such reasonable conditions as it sees fit.—*Lamb, Assignee*, v. *Lamb*, 17.

17. It is a good defense to a premium note to a mutual insurance company of another State, that the note was given in Indiana to an agent of the company, the company not having complied with the Indiana Statute respecting foreign corporations. Mutual insurance companies are clearly within the statute.—*Ibid.*

18. A creditor of a corporation who has proved his claim and received a dividend thereon, may prosecute an action against the corporation to recover the balance.—*New Lamp Chimney Co.* v. *Ansonia Brass and Copper Co.*, 385.

See CONSTITUTIONAL LAW, 5; EVIDENCE, 4; INVOLUNTARY BANKRUPTCY, 1, 14.

CRIMES.

1. It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months prior to the commencement of the proceedings in bankruptcy, in order to convict a party of a fraudulent disposition thereof.—*United States* v. *Smith*, 61.

2. The intent of a party is ordinarily to be inferred from evidence which tends distinctly and directly to prove the intent.—*Ibid.*

3. In order to obtain a conviction for concealing assets from the assignee, it is not necessary to prove a demand on the part of the assignee.—*Ibid.*

4. Under an indictment based upon the ninth clause of the 44th Section of the Bankrupt Law, Revised Statutes, Section 5132, charging the defendant with obtaining goods under the false pretense of carrying on business, and dealing in the ordinary course of trade, it must be shown that the defendant represented to the person from whom the goods were obtained, that he was so carrying on business, that the person was induced to part with his goods by reason of such representation, and that he was not so carrying on business. But this representation may be by acts and conduct as well as by words.—*United States* v. *Penn*, 464.

5. The rule as to the measure and character of proof in criminal cases. —*Ibid.*

6. Under the tenth clause of this section, it must be shown that the intent to defraud existed in the mind of the bankrupt against his creditors generally, and not against this particular creditor from whom the goods were obtained.—*Ibid.*
7. A criminal intent is not to be presumed, but must be proved.—*The United States* v. *Bayer*, 88.
8. The doubt which will entitle a defendant to an acquittal must be reasonable.—*Ibid.*
9. A chattel mortgage is a disposition of property out of the usual course of business of the mortgageor.—*Ibid.*
10. Under the Statutes (Rev. Stats., Sections 5132, 5440), other persons than the bankrupt can *conspire* with the latter to commit the acts made criminal, under the seventh and tenth subdivisions, Section 5132, of the Revised Statutes.—*United States* v. *Bayer et al.*, 400.
11. *It seems* that under criminal section of the Bankrupt Act (Rev. Stats., Section 5132), one who procures and abets the person against whom the proceedings in bankruptcy are pending, to commit the acts therein made criminal, may be indicted, though not expressly referred to in the Statute.—*Ibid.*

DEBTS.

1. A voluntary contribution received by a debtor, does not constitute a debt due by him.—*In re Oregon Bulletin Printing & Publishing Co.*, 503.
2. A note given to compensate another for indorsing a note for the maker is valid.—*Providence County Savings Bank et al.* v. *Frost, Trustee*, 356.
3. Although a note is executed and made payable in one State, yet if it is sent to another State to be there indorsed for the accommodation of the maker and discounted for his benefit, it is valid, if the rate of interest is such as is allowed by the laws of the latter State.—*Ibid.*
4. A bank that loans money on business paper indorsed by the bankrupt does not hold such paper as collateral security.—*In re George S. Weeks*, 263.
5. All payments made before proof upon a note indorsed by the bankrupt must be applied to reduce the sum upon which a dividend can be demanded.—*Ibid.*
6. Payments made by the maker after the proof of the note against an indorser cannot affect the amount to be paid from the estate, so long as both payments do not exceed the sum due on the face of the note.—*Ibid.*
7. If the maker of a note agrees to wait a certain time for another party to purchase his property and pay his debts, without any promise on the part of the proposed purchaser, and a friend advances money to purchase the note, there is no such agreement for time as will release the indorser.—*Ex parte Balch—In re Elliott Felting Mills*, 160.
8. If a party intending to take the property of a corporation, and pay its debts, buys one of its notes indorsed by the bankrupt, this does not release the indorser.—*Ibid.*
9. A representation that a note has been paid does not operate as an estoppel, unless there has been some actual loss.—*Ibid.*

10. Where a savings bank is prohibited from loaning money on personal security, a note taken therefor is void, and does not constitute a provable debt.—*In re Jaycox & Green*, 122.
11. Where a savings bank is prohibited from making a loan on personal security, a claim for money so loaned is not provable.—*Ibid.*
12. A bond to return property, if the decision in a case requires it, is not a provable debt if the decision is not rendered until after the final dividend.—*United States* v. *Rob Roy and cargo*, 235.

See PARTNERS, 6–9; PROOF.

DEPOSITIONS.—See INVOLUNTARY BANKRUPTCY, 15, 18, 21; PROOF.

DISCHARGE.

1. Inability to secure the consent of a majority in number and value of the creditors to a discharge, is no sufficient excuse for delay in applying therefor, when the time limited for making such application had elapsed before the adoption of the amendment reducing the number required to consent to a discharge.—*In re Lowenstein*, 479.
2. A partner who is brought into bankruptcy by his copartner must obtain the assent of the requisite proportion of the creditors, or have assets to the required amount.—*In re W. F. Wilson*, 253.
3. A proceeding in bankruptcy by one partner against his copartner is not an involuntary or compulsory proceeding.—*Ibid.*
4. Notice of creditors' appearance in opposition to discharge, addressed to the Register, bearing date on the day of hearing of the petition for discharge, was filed with the Clerk of the Court, at a General Term thereof, more than a year thereafter, and was never filed with the Register.

Creditors' specification of grounds of opposition to discharge was filed with the Register on the day after the final hearing.

Held, That the specifications were not filed in accordance with the provisions of law, and could not be considered. The discharge granted.—*In re Buxbaum*, 477.

5. A mere omission of property from the schedules is not of itself a ground for refusing a discharge.—*In re Smith*, 256.
6. Where property has been transferred, an omission to place it on the schedules is no ground for refusing a discharge, unless there was a design to conceal the property.—*Ibid.*
7. A mere preference given without contemplation of the proceedings in bankruptcy, and more than six months before the filing of the petition, is no ground for withholding a discharge.—*In re Oliver L. Jones*, 286.
8. A fraudulent conveyance made at a time so recent that it will affect any of the creditors who can come in under the bankruptcy, is a ground for withholding the discharge.—*Ibid.*
9. In a proceeding to set aside a discharge, a creditor cannot rely upon testimony known to him before the granting of the discharge.—*In re A. P. Marionneaux*, 222.
10. A discharge cannot be impeached in a State court on the ground that the

name of the creditor was fraudulently omitted from the schedule, and he had no notice of the proceedings.—*Black* v. *Blaco*, 195.

11. A discharge bars the claim of a creditor, although it was fraudulently omitted from the schedule, and he received no notice of the pendency of the proceedings.—*Thurmond* v. *Andrews and Wife*, 157.
12. The notice required to give the court jurisdiction to grant a discharge is the notice prescribed to be given on the application therefor.—*Ibid.*
13. The claim of a creditor is barred by a discharge, although his name was not placed on the schedule nor any notice given to him of the proceedings.—*Platt* v. *Parker*, 14.
14. Where the record shows that the original demand or cause of action sprung from fraud, the judgment does not merge the fraud, and is not released by a discharge.—*Warner* v. *Cronkhite*, 52.
15. Where the record shows a material and traversable allegation of fraud as its sole foundation, the judgment need not on its face show that the demand originated in fraud.—*Ibid.*
16. If there is no evidence when the final dividend was made, no claims can be deemed provable except those which are liquidated and fixed at the time of the adjudication of bankruptcy.—*United States* v. *Rob Roy and cargo*, 235.
17. A discharge does not release a bankrupt from debts due to the United States.—*Ibid.*
18. The claim of a conditional vendor for a conversion of the property by the bankrupt is not barred by a discharge.—*Johnson* v. *Worden*, 335.
19. A conditional vendor, by proving his debt, does not lose his claim for the conversion of the property.—*Ibid.*
20. A bond filed by a claimant to obtain a delivery of property to him, is not a debt created by fraud, although he subsequently endeavored to sustain his case by false testimony.—*United States* v. *Rob Roy and cargo*, 235.
21. A discharge does not release a bankrupt from his liability as surety on an injunction bond, when the proceedings in which the injunction was issued are not determined until after the granting thereof.—*Eastman* v. *Hibbard et al.*, 360.

DISTRICT COURT.—See CORPORATION, 3, 4; JURISDICTION.

DIVIDENDS.

1. If the declaration of a dividend on a particular claim was unauthorized, the assignee may withhold its payment.—*In re Herrick and Herrick*, 312.
2. A trustee of a bankrupt corporation who has made himself individually liable to the creditors cannot be excluded from participating in the dividends until the other creditors are paid in full.—*Bristol, Assignee*, v. *Sanford*, 78.
3. If the bankrupt received property as security for endorsements and notes made by him for the accommodation of the owner, the holder of one of

these notes is not entitled to a summary order directing the payment of his claim out of the property.—*Hurst* v. *Taft, Assignee*, 109

See DEBTS—PROOF.

EVIDENCE.

1. The examination of a witness before an examining court, where the witness has since died, is competent evidence in a trial upon indictment of the party for the same offense.—*United States* v. *Penn*, 464.
2. The statements of a party charged with absconding, made on his way from the place of his residence, as to his intention of returning, is competent evidence to disprove the charge.—*Ibid.*
3. A defense which has been stricken out of the case may be given in evidence as an admission.—*In re Oregon Bulletin Printing & Publishing Co.*, 503.
4. A paper sworn to and filed by an officer of a corporation is competent evidence against it, but is not conclusive.—*Ibid.*
5. In an action by an assignee against an assignor of a note, evidence of the bankruptcy of the maker is admissible under an allegation that a suit against him would be unavailing.—*Wills et al.* v. *Claflin et al.*, 487.
6. The declarations of the bankrupt in regard to a transfer made as a preference are competent evidence against the preferred creditor, if the conspiracy to give the preference is established, although they were not made in the presence of or brought to the knowledge of the preferred creditor.—*Nudd and Noe* v. *Burrows, Assignee*, 289.
7. The declarations of an alleged partner of the bankrupt in regard to the existence of the alleged partnership, are not competent evidence.—*Ibid.*
8. The dying declarations of a fraudulent grantee are not admissible against the bankrupt.—*In re A. P. Marionneaux*, 222.
9. The alleged conspiracy must be established before the declarations of one conspirator are admissible against a co-conspirator.—*Ibid.*
10. A copy of the record containing the assignment is admissible in evidence to prove the assignment, although it does not purport to be a copy of the whole record.—*Mitchener* v. *Payson, Assignee*, 49.
11. The proceedings in bankruptcy are not deemed to constitute an integral record, but a copy of each proceeding may be authenticated as a separate record, and is competent presumptive evidence of the facts therein stated.—*Ibid.*
12. In an action by an assignee to collect an assessment on the unpaid subscription of a stockholder, evidence of misrepresentations made at the time of the subscription to the stockholder, by an agent of the corporation, is not admissible.—*Ibid.*

EXAMINATION.

1. It is the right of a creditor to have a full disclosure, on oath, by the bankrupt, of everything relating to his estate, and with such detail as will be necessary, or may be useful to the assignee in the discharge of his

duties; and it is the duty of the bankrupt to submit to such examination promptly, on reasonable application.—*In re James W. Frisbie*, 349.

2. A bankrupt who has fully submitted to examination has a right to be protected against unreasonable demands upon his time for further examination; and when ample opportunity has been afforded, and an examination already had is apparently full, unless it is made to appear that such examination was collusive, or in some material and specified particulars deficient, an application for further examination may properly be refused.—*Ibid.*
3. A witness not being a "party" to the proceeding, is not entitled to be attended or represented by counsel during his examination.—*In re C. B. Comstock & Co.*, 193.
4. A creditor of the bankrupt is not a "party" to such proceeding, and is therefore not entitled to interfere with it, or be represented in it by counsel.—*Ibid.*

EXEMPTIONS.

1. A bankrupt is entitled to an exemption of his household furniture and other necessary articles, although they were taken under an execution prior to the commencement of the proceedings in bankruptcy.—*In re Nicholas Martin*, 397.
2. No individual exemption can be allowed out of the partnership estate at the expense of the joint creditors.—*In re Stewart & Newton*, 295; *In re D. H. Tonne*, 170.
3. The right of exemption must exist, if at all, at the date of the commencement of proceedings in bankruptcy.—*In re George T. Duerson*, 183.
4. Under the laws of Kentucky, a bankrupt is not entitled to an exemption of an undivided interest in land on which there are no improvements, appurtenances, or dwelling houses, although he has expressed an intention to make it a homestead.—*Ibid.*
5. Congress, in adopting the Exemption Laws of a State as part of the Bankrupt Law, cannot dispense with any of the limitations imposed by that law.—*Ibid.*
6. Under the laws of Kentucky an exemption of land cannot be allowed as against debts contracted before its acquisition.—*Ibid.*
7. If a prior mortgage is paid, a judgment may be enforced against the surplus over the exemption allowed by law.—*Haworth* v. *Travis et al.*, 145.
8. An allotment of an exemption by the assignee does not impair the lien of a judgment.—*Ibid.*
9. Where a lot of ground claimed as exempt under the laws of Illinois is worth more than one thousand dollars, a judgment is a lien on the excess.—*Ibid.*
10. The bankrupt is entitled to an exemption, although his wife owns a house.—*In re D. H. Tonne*, 170.

See CONSTITUTIONAL LAW, 4.

FEES.

1. In composition cases the Register is entitled to five dollars for incidental

expenses; three dollars for the meeting; five dollars when acting under a special order; ten cents for filing each paper; twenty cents for each folio of the examination; twenty-five cents for each affidavit; one dollar for ordering an adjournment of a meeting, and ten cents for each folio of the report.—*In re Benj. F. Spillman*, 214.

2. If the confirmation is presented to the Register, the time spent in examining it may be considered as spent under a special order.—*Ibid.*
3. A Register is not bound to countersign a check, unless the fee is first tendered to him.—*In re Breck & Schermerhorn*, 216.

FRAUD.

A party who claims to have been drawn into a purchase by fraud, must exercise care and vigilance to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud.—*Upton, Assignee*, v. *Tribilcock*, 171.

See CORPORATIONS, 9, 12, 14, 15; DISCHARGE, 14, 15, 20.

FRAUDULENT CONVEYANCE.

1. Where the conveyance was moderate in amount and all the debts of the grantor in existence at the time thereof have since been paid, it cannot be impeached by the grantor's assignee, although it was voluntary.—*Smith et al.* v. *Vodges, Assignee*, 433.
2. If an indorsement on the back of a mortgage, to the effect that it shall cover property acquired after its execution, is made for the purpose of defrauding creditors, the indorsement is void, but does not in any manner affect the validity of the mortgage.—*Withed* v. *Pilsbury and Titcomb, Assignees*, 241.
3. Where the evidence merely shows that the parties endeavored to obtain all the advantage that the law would afford them, there is no such collusion as will deprive them of rights to which they would otherwise be entitled.—*Ibid.*
4. A creditor cannot institute a proceeding to set aside a fraudulent conveyance after the commencement of the proceedings in bankruptcy.—*Thurmond* v. *Andrews and Wife*, 157.

See DISCHARGE, 8; EVIDENCE, 8.

GIFT—See ASSIGNEE, 1, 2; FRAUDULENT CONVEYANCE, 1.

INJUNCTION.

1. A creditor who has filed a creditor's bill in a State court, and obtained the appointment of a receiver prior to the commencement of the proceedings in bankruptcy, may be enjoined from proceeding further in the State court.—*In re R. M. Whipple*, 373.
2. The District Court may enjoin parties to an action pending in a State court, from proceeding under a writ of sequestration to take property from the possession of the assignee.—*Hewett, Executor*, v. *Norton, Assignee*, 276.

8. If the assignee voluntarily appears in a proceeding in a State court to foreclose a mortgage, instituted after the commencement of the proceedings in bankruptcy, he cannot after a sale of the property apply to the District Court for an injunction to restrain further proceedings in the State court.—*Augustine, Assignee*, v. *McFarland et al.*, 7.

INSOLVENCY.

1. A trader who cannot pay his debts in the ordinary course of business is insolvent, although he is not compelled to stop business, and may on a settlement of his affairs have sufficient to pay in full.—*Jackson, Assignee*, v. *McCulloch et al.*, 283.
2. A debtor is insolvent if his property, put up on reasonable notice for sale, where it exists under the circumstances of the case, will not bring cash enough to pay his debts.—*In re Oregon Bulletin Printing & Publishing Co.*, 503.

INSOLVENT LAWS.—See CONSTITUTIONAL LAW, 5–8.

INVOLUNTARY BANKRUPTCY.

1. A petition to have a corporation adjudged a bankrupt may be maintained under Section 5122 of the Revised Statutes by *any creditor* of such corporation, and the provision of Section 12 of the Act of June 22, 1874, in relation to the number and amount of the creditors required to join in such petition against a natural person, does not apply.—*In re Oregon Bulletin Printing & Publishing Co.*, 199.
2. Where a question is made as to whether a sufficient number of creditors have joined in an involuntary petition, the case may be referred to a Register or Commissioner to examine the proofs and report thereon.—*In re Edward Sargent*, 144.
3. Secured creditors are not to be reckoned in computing the number of creditors who must join in an involuntary petition.—*In re Greenpond Railroad Co.*, 118.
4. It is not necessary that the larger creditors shall be requested to sign the petition and refuse.—*In re J. R. Currier*, 68.
5. Debts for a less sum than two hundred and fifty dollars are to be reckoned in the amount that is necessary to join in an involuntary petition.—*In re J. R. Currier*, 68. *In re Woodford & Chamberlain*, 575.
6. The creditors may obtain one-fourth in number of the creditors whose debts exceed two hundred and fifty dollars, or one-fourth of all, provided one-third in amount of all the debts are represented in the petition.—*In re J. R. Currier*, 68.
7. The debt due to a preferred creditor is not to be computed in determining whether the requisite proportion in number and value have joined in an involuntary petition. A preferred creditor cannot prove his debt until he has voluntarily or by compulsion surrendered his preference.—*Ibid.*
8. Creditors whose claims are under two hundred and fifty dollars are not to be counted in computing the number who must unite in an involun-

tary petition, if one-fourth of the creditors whose claims are above that sum join in the petition.—*In re Woodford & Chamberlain*, 575.

9. A party may purchase a claim in good faith, in order to join in an involuntary petition and make the necessary number.—*Ibid.*
10. If the sale of a claim is void for fraud or want of consideration, the claim is to be deemed to belong to the assignor.—*Ibid.*
11. A creditor who has in good faith joined in an involuntary petition cannot withdraw.—*In re Edward Sargent*, 144.
12. If a creditor was induced to join an involuntary petition by misrepresentation, he may be allowed to withdraw at any time before adjudication.—*Ibid.*
13. An attaching creditor may intervene and oppose an adjudication of bankruptcy.—*In re Francis M. Jack*, 296.
14. A corporation, by appearing and answering a petition, thereby admits that it may be proceeded against in bankruptcy, and cannot afterwards object that the petition does not allege that it is a moneyed, business, or commercial corporation.—*In re Oregon Bulletin Printing & Publishing Co.*, 503.
15. A deposition to an act of bankruptcy consisting of a fraudulent conveyance must allege or show the fraudulent intent of the debtor in making the conveyance.—*Cunningham* v. *Cady*, 525.
16. A deposition to a proof of a claim in involuntary bankruptcy must show whether the claim is secured or unsecured.—*Ibid.*
17. A petition will not be dismissed, because the depositions in support thereof are defective; but the petitioning creditor, on motion, will be allowed to file supplemental depositions.—*Ibid.*
18. When the depositions are defective, the order to show cause will be set aside, but a new order may be issued on supplemental depositions.—*Ibid.*
19. An affidavit to an involuntary petition may be amended.—*In re Edward Sargent*, 144.
20. A creditor who has joined in an involuntary petition cannot afterwards object to an amendment thereof, which is necessary to the prosecution of the same to final effect.—*Ibid.*
21. If an agent verifies a petition or deposition, he must show his authority.—*Ibid.*
22. A petitioning creditor is not required to make full and complete proof of the debtor's insolvency, but may offer proof tending to show his insolvency, and the debtor must then explain the evidence if possible, for he is best acquainted with the condition of his own affairs.—*In re Oregon Bulletin Printing & Publishing Co.*, 503.
23. The knowledge or motive of the preferred creditor is immaterial in an involuntary proceeding.—*Ibid.*
24. In a case of involuntary bankruptcy, the burden of proof is on the petitioning creditor.—*Ibid.*
25. A debtor who is solvent may pay any or all of his debts, although proceedings in bankruptcy are pending against him.—*Ibid.*

26. An adjudication entered on the 22d day of June, 1874, may be set aside on the motion of the debtor, if the provisions of the act passed on that day were not complied with.—*In re Carrier & Baum*, 208.

See CORPORATIONS, 2.

JURISDICTION.

DISTRICT COURT.

1. The several District Courts have jurisdiction of suits brought by assignees appointed by other District Courts.— *Lathrop* v. *Drake et al.*, 472.
2. Property cannot be taken from the possession of a receiver appointed before the commencement of the proceedings in bankruptcy, in an action to foreclose a mortgage, without discharging the mortgage debt.—*Davis et al., Trustees*, v. *Railroad Co. et al.*, 258.
3. Proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which have been obtained by any creditor by the use of diligence.—*In re R. M. Whipple*, 373.

CIRCUIT COURTS.

4. The Circuit Courts have concurrent jurisdiction with the District Courts over suits brought by an assignee appointed in another district.—*Lathrop* v. *Drake et al.*, 472.
5. The Circuit Court has no jurisdiction of a bill in equity, filed by creditors before the appointment of an assignee, to restrain a chattel mortgage in possession from disposing of the goods of an alleged bankrupt. It would appear that the District Court has such jurisdiction.—*Johnson et al.* v. *Price*, 523.

STATE COURTS.

6. A proceeding to foreclose a mortgage instituted in a State court after the commencement of the proceedings in bankruptcy, without making the assignee of the mortgagor a party thereto, is valid as against all persons who are parties thereto.—*Brown* v. *Gibbons*, 407.
7. If the assignee does not seek to redeem mortgaged property, the mortgagee may proceed in a State court to foreclose the mortgage, and such a proceeding is not absolutely void.—*McKay* v. *Funk*, 334; *Brown* v. *Gibbons*, 407.
8. If an assignee appears in a State court in an action brought to enforce a lien against the bankrupt's estate, execution may be stayed in order to give the parties an opportunity to apply to the District Court.—*Rowe* v. *Page*, 366.
9. The Bankrupt Law does not divest a lien, but, as all the property of a bankrupt, as well that subject to mortgages and liens as that which is unencumbered, passed to the assignee, and is in *custodia legis*, subject to priorities and liens, it follows that the Bankrupt Court is the proper tribunal in which to administer the remedies for the enforcement of liens.—*Blum, Executor*, v. *Ellis*, 345.

10. All claimants against the estate of a bankrupt are required to prove their debts, however evidenced.—*Blum, Executor*, v. *Ellis*, 345.
11. The commencement of proceedings in bankruptcy does not affect the jurisdiction of a State court over a proceeding then pending to foreclose a mortgage, and a sale thereunder will pass a valid title, although the assignee is not made a party thereto.—*Eyster* v. *Gaff*, 546.
12. The Bankrupt Act does not divest State courts of jurisdiction over actions involving the right to real or personal property of the bankrupt, or debts owing to his estate.—*Ibid.*
13. The prosecution of an action in a State court relating to property held by the bankrupt, may be continued, if it was begun before the commencement of the proceedings in bankruptcy.—*Hewett, Executor*, v. *Norton, Assignee*, 276.
14. Although a suit is pending in a State court at the time of the commencement of the proceedings in bankruptcy, yet a writ of sequestration cannot be issued after that time to take the property from the possession of the assignee.—*Ibid.*
15. No State court can require a bank in which the funds belonging to a bankrupt's estate are deposited, to pay a judgment against the assignee out of such funds.—*Havens* v. *National City Bank*, 95.

See CORPORATIONS, 7; DISCHARGE, 10.

LANDLORD AND TENANT.—See LIENS, 13.

LIENS.

1. Where property which is incumbered by liens is sold at the suggestion of the general creditors, and brings no more than the amount of the liens, it is not chargeable with any costs, except the actual cost of sale.—*In re Blue Ridge Railroad Co.*, 316.
2. Where property is sold free from a mortgage, the Bankrupt Court has no authority to adjust the claims of the trustee under the mortgage against the *cestuis que trust*, nor to ascertain what is due by him to his counsel.—*Ibid.*
3. Merely proving a secured claim as a general claim, does not waive the security.—*Hatch* v. *Seely*, 380.
4. If an attaching creditor, under the provisions of the State law, pays off a mortgage, he will, upon the dissolution of the attachment by bankruptcy, be entitled to repayment out of the proceeds in the hands of the assignee, resulting from a sale of the property.—*Whithed* v. *Pilsbury and Titcomb, Assignees*, 241.
5. Where a party is compelled to pay the debt of a bankrupt in order to protect his own rights, he is entitled to be subrogated to the rights of the creditor as a matter of course, without any agreement to that effect. —*Ibid.*
6. A Register has a lien on the fund in court which has been awarded to a party.—*In re Breck & Schermerhorn*, 216.
7. The State of New York has a lien upon the machinery and tools of a contractor, for the services of convicts, which are used by him on the prison premises for operating the contract.—*In re Burt & Towne*, 137.

8. A contract for the services of convicts is valid, although the contractor does not make the deposit with the comptroller as required by law.—*Ibid.*

9. Where collateral securities are deposited, for securing a particular note, with a banking company, by a stockholder who also owes it other notes, the collaterals consisting in chief part of shares in the company and in part of other securities; and the charter and by-laws of the company give a general lien upon the shares of its stockholders for all debts due by them; and the maker of the notes afterwards becomes a bankrupt:

Held, That the banking company has a general lien upon the shares of stock thus pledged, for the satisfaction of all the notes of the bankrupt due the company.

Held, also, that the remaining securities are bound for the other notes due on the principle of equity; that the equities being equal between the company and the general creditors in bankruptcy, the possession of the securities by the company gives it preference.

Held, also, that a Bankruptcy Court must rule as a court of equity would do upon such a pledge of collaterals, unless it can be proved that the pledging of them was made by the bankrupt under circumstances that would render the preference void under the 35th Section of the General Bankruptcy Act.—*In re Lemuel Peebles—Ex parte Thomas G. Watkins, Assignee*, 149.

10. The lien of a judgment is not affected by the Bankrupt Law.—*Haworth v. Travis et al.*, 145.

11. A broker who holds stocks on a margin is bound to take notice of the buyer's bankruptcy.—*In re John H. Daniels*, 46.

12. If a broker who holds stocks on a margin, continues to hold them for an unreasonable length of time after the buyer's bankruptcy, and then sells them without notice, he must sustain the loss.—*Ibid.*

13. Under the laws of Pennsylvania, a landlord is entitled to a lien for rent if an execution is issued before the commencement of the proceedings in bankruptcy, although the levy was not made, nor a notice given to the sheriff until after that time.—*In re Barnes' Appeal*, 543.

14. If a Register refuses to countersign a check, in a case where the check ought to be countersigned, he is not entitled to a lien on the fund for his services in making a certificate.—*In re Philip Rein*, 551.

See EXEMPTIONS, 8, 9; JURISDICTION, 6–11; MORTGAGES.

LIMITATIONS.

1. A right of action is barred by the limitation of two years, although the assignee did not discover the right until after the expiration of the two years.—*Norton, Assignee, v. De La Villebeauve*, 304.

2. The limitation of two years applies to those causes of action which existed before the bankruptcy, and came to the assignee by the assignment, as well as to those which arise after the bankruptcy.—*Ibid.*

MORTGAGES.

1. A mortgagee does not lose his lien by omitting to prove his debt, but may enforce the mortgage after the termination of the proceedings in bankruptcy.—*Assignee of Wicks & Co.* v. *Perkins*, 281.
2. A sale of land by an assignee, without an order of court, does not divest the lien of a mortgage.—*Assignee of Wicks & Co.* v. *Perkins*, 281.
3. A mortgage made in good faith to secure future sales of goods to the mortgageor is valid to the extent of the advances actually made.—*Marvin, Assignee*, v. *Chambers*, 77.

See JURISDICTION, 9–11; LIENS, 2.

NOTICE.—See ASSIGNEE, 19.

PARTNERS.

1. Where there are assets of a firm and of individual members thereof, each estate must pay its proportion of the entire expenses of administering the estate.—*In re Smith and Smith*, 500.
2. Where there are partnership assets, the firm creditors cannot share in the individual estate.—*Ibid.*
3. Where partners file separate petitions, the firm creditors must be postponed to the separate creditors, in the distribution of the separate estate, whether there are joint assets or not.—*In re Edward P. Morse*, 876.
4. It is of no consequence, excepting in the matter of expense, whether there are two proceedings by or against partners, or only one, for everything is conducted in the same way, and the rights of creditors and all others are precisely the same.—*Ibid.*
5. If a partner after a formal dissolution continues to carry on business under the firm name, with the consent of his copartner, his trade assets should be treated as joint assets.—*Ibid.*
6. A judgment against partners and others jointly, is a several claim as against the bankrupts, and cannot receive a dividend from the joint estate.—*In re Herrick and Herrick*, 312.
7. If a person loans money for the use of a firm, and accepts the note of one partner, he cannot maintain an action against the firm.—*Ibid.*
8. If a party who accepts the note of one partner is ignorant that the loan is for the firm, he cannot maintain an action against the firm after he has recovered a judgment against the partner on the note.—*Ibid.*
9. If a creditor holding a note against a firm, proves it against the estate of two of the partners who took the assets and agreed to pay the firm debt, he may prove for the balance against the estate of the other partner, and share *pro rata* with his creditors.—*In re R. S. Pease*, 168.
10. The rule in regard to the distribution of the assets of a firm, does not apply where one partner alone is bankrupt.—*Ibid.*
11. A certificate that the special partner has contributed a certain sum in cash, and a certain amount in goods, does not comply with the Statutes of New York relating to limited partnerships, and the parties may be put into bankruptcy as general partners.—*In re Wm. G. Merrill et al.*, 91.

12. The rule that the joint estate must be applied to pay the joint debts, and the separate estate to pay the separate debts, is only applicable where the joint estate as well as the separate estate is before the court for distribution.—*United States* v. *Lewis et al.*, 33.

See DISCHARGE, 2, 3; EXEMPTIONS, 2; PRIORITY, 1, 3.

PRACTICE.

FEDERAL COURTS.

1. The court, in instructing the jury, may comment upon the evidence, if the jury distinctly understand that what is said as to the facts is only advisory, and in nowise intended to fetter the exercise finally of their own independent judgment.—*Nudd and Noe* v. *Burrows, Assignee*, 289.

2. Where there is no contradictory evidence on a point, it should be ruled as a question of law.—*Upton, Assignee*, v. *Tribilcock*, 171.

3. If the defense is based on an alleged fraud, an instruction on that point should not introduce facts pertaining to another fraud.—*Ibid.*

4. Where the assignee denies the validity of a claim and asserts title to the property, the claimant cannot proceed by a summary petition.—*Hurst* v. *Teft, Assignee*, 109.

5. Where property is improperly taken from the possession of a receiver, and sold under an order of the District Court, the Circuit Court, on reversing the proceeding, will set aside the sale, and direct the property to be surrendered to the receiver.—*Davis et al., Trustees*, v. *Railroad Company et al.*, 258.

6. A general denial of fraud in an answer is equivalent to nothing more than a denial of a conclusion of law.—*Lathrop* v. *Drake et al.*, 472.

7. When an adjudication of bankruptcy is proved, the party who alleges that the proceedings have been dismissed must prove the time of dismissal.—*Wills et al.* v. *Claflin et al.*, 437.

8. The personal conduct and administration of the Federal judges, in the discharge of their functions, need not conform to the practice in the State courts.—*Nudd and Noe* v. *Burrows, Assignee*, 289.

STATE COURTS.

9. A defendant generally has a right to set up by supplemental answer matter of defense which has occurred or come to his knowledge subsequently to the filing of his first answer.—*Holyoke et al.* v. *Adams et al.*, 413.

10. The defendant should apply by motion for leave to file a supplemental answer, so that the opposite party may be heard, and the court may determine whether there has been inexcusable *laches*, or whether any reasons appear, which are recognized as giving authority for refusing the motion.—*Ibid.*

11. Leave to file a supplemental answer must be granted, unless the papers show a case in which the court may exercise a discretion as to granting or withholding it.—*Ibid.*

PREFERENCE.

1. No particular or specific evidence of an intent to prefer is necessary

when a payment is made by an insolvent debtor, for the act itself is sufficient evidence of the intent.—*In re Oregon Bulletin Printing & Publishing Co.*, 503.

2. The law will not presume an intent to prefer when the debtor is not aware of his insolvency, but it is incumbent on him to show it.—*Ibid.*
3. If a creditor advances money to pay a valid execution, and then takes a judgment for the advance and his own debt, an execution thereon will be good as to the advance, but void as to the rest.—*Lathrop* v. *Drake et al.*, 472.
4. The circumstances attending a transfer may be such that the creditor will not be justified in relying on the debtor's false statements as to his condition.—*Bucknam, Assignee*, v. *Goss*, 337.
5. If a mortgage is made in part to prefer the mortgagee as to his claim, and in part to secure a present loan made for the purpose of enabling the debtor to prefer another creditor, it is entirely void.—*Ibid.*
6. A transfer of property to a factor, so that it may become subject to his lien, and with the intent thereby to give him a preference, may be set aside.—*Nudd and Noe* v. *Burrows, Assignee*, 289.
7. An exchange of securities is not a fraudulent preference even when the creditor and debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and is undoubtedly of equal value with the security substituted for it.—*Sawyer and Frazier* v. *Turpin et al.*, 271.
8. If a bill of sale, under the laws of the State, although it is not placed on record or attended by possession of the property, vests a complete title in the grantee, subject only to be defeated by some intervening right acquired before the record is made or possession taken, it will constitute a sufficient consideration for a mortgage, although there was an agreement that it should not be recorded and should be kept secret.—*Ibid.*
9. If the bankrupt delivered goods to the workmen of a creditor, upon the credit of the creditor, with the expectation that they would be paid for at the next pay-day, there is no preference, although the creditor subsequently applies the amount to a pre-existing debt.—*Rice et al.*, v. *Grafton Mills*, 209.
10. The fact that the affidavit was filed and execution issued and levied on the same day on which the proceedings in bankruptcy were commenced, does not prove collusion.—*Witt, Assignee*, v. *Hereth*, 106.
11. A creditor may reduce his demand within the jurisdiction of a magistrate, take a judgment by default therefor, and obtain a priority by an execution issued thereon.—*Ibid.*
12. Where the law allows a judgment-creditor to issue an execution immediately, when it shall be made to appear that delay will endanger the collection of the judgment, he may do so, and obtain a priority thereby.—*Ibid.*
13. The presumption that a man intends the natural and probable consequences of his acts, is only one element of proof to establish the fact of actual intent.—*Rice et al.* v. *Grafton Mills*, 209.

14. The Amendment of June 22d, 1874, does not affect a suit to recover a preference which was brought prior to December 1, 1873.—*Slafter, Assignee*, v. *Greer Turner Sugar Refining Co.*, 520.

See PROOF, 9–13.

PRIORITY.

1. If the United States holds a demand against a firm, some of the partners of which reside in a foreign country, and the resident partners become bankrupt, it is entitled to priority of payment out of their separate estates.—*United States* v. *Lewis et al.*, 33.
2. The United States may enforce its right to priority without first exhausting the securities it may hold for the claim.—*Ibid.*
3. The United States is entitled to priority of payment out of the separate estates of the partners, although its demand is against the firm.—*Ibid.*

See PROOF, 8.

PROOF.

1. A mere agent holding negotiable paper cannot, under objection, prove it, when the owner is in a situation to make the proof himself.—*In re W. A. Saunders*, 164.
2. A proof in due form makes out a *prima facie* case, subject to the discretion of the Register and court to order further proof, and to the right of any creditor, or person interested, to offer counter-proof.—*Ibid.*
3. A creditor is not obliged, by the mere interposition of an objection, to produce such evidence as would be necessary at an ordinary trial.—*Ibid.*
4. On the hearing of a motion to expunge a proof, the moving party is entitled to open and close.—*Canby, Assignee*, v. *McLear*, 23.
5. If the testimony of the bankrupt is desired on a motion to expunge a proof, he should be summoned as a witness.—*Ibid.*
6. The answer to a petition to expunge a proof cannot be used as evidence.—*Ibid.*
7. The papers annexed to an answer to a petition to expunge a proof, can only be used as evidence by being proved in the usual manner.—*Ibid.*
8. The United States need not prove its debt before filing a bill to enforce its right to priority of payment.—*United States* v. *Lewis et al.*, 33.
9. A mere re-payment to the debtor cannot take the place of a surrender to the assignee.—*In re J. R. Currier*, 68.
10. A trustee who accepts a deed of trust, given as a preference, and purporting to secure his claim, without any express qualification, assents to it as creditor, and cannot prove his claim without surrendering the preference.—*In re W. A. Saunders*, 164.
11. A preferred creditor may surrender his preference at the first meeting of creditors and vote for an assignee.—*Ibid.*

12. A creditor who has never assented to a deed of trust, intended as a preference, and purporting to secure his claim, may disclaim all interest therein, and prove his claim as unsecured.—*Ibid.*

13. A preferred creditor cannot prove his debt after the assignee has obtained a judgment against him setting aside the preference.—*In re Cramer*, 225.

14. A plea in bar that since the commencement of the suit the defendant has been adjudged bankrupt, and the plaintiff has proved his debt in bankruptcy, and that the bankruptcy proceedings are still pending, is insufficient.—*Brandon Manufacturing Co.* v. *Frazer & Co.*, 362.

15. A note which is held by a party as trustee for another, must be proved by the holder as trustee, or by the real owner.—*In re Lane, Brett & Co., Ex parte Dreyfus*, 43.

See ATTACHMENTS, 10; DEBTS, LIENS, 3; PARTNERS, 6–9.

RECORD.—See EVIDENCE, 10–12.

REGISTERS.

1. Registers may take cognizance of uncontested petitions filed by attorneys against the assignee, to compel the payment of their fees and disbursements.—*In re Henry H. Stafford*, 378.

2. When the marshal's bill has been taxed by the clerk, the Register should countersign a check therefor.—*In re Philip Rein*, 551.

3. If the bankrupt is a party to a submission of a controversy to a Register, he is bound by the decision in a collateral action.—*Johnson* v. *Worden*, 335.

See CERTIFICATE, FEES, LIENS, 6, 14.

REPEAL.

The original Bankrupt Act of 1867, and all the acts amendatory thereof, except the Act of 1874, aforesaid, were superseded by the Title BANKRUPTCY of the Revised Statutes, and repealed by Section 5596 of said Statutes.—*In re Oregon Bulletin Printing & Publishing Co*, 199.

Quære, Whether such appeal took effect from the enactment of the Revised Statutes, on June 22, 1874, or from December 1, 1873, the data on which said Statutes took effect, as declared in Section 5595 thereof.—*Ibid.*

REVIEW.

A formal bill of review may be treated as a petition for review.—*Hurst* v. *Teft, Assignee*, 109.

SALE.

1. A party who expects to bid at an assignee's sale may, when the terms are cash, on the day of the sale, agree with another that, in case he becomes the purchaser, he will sell the property to the latter at a named price on terms of credit.—*Citizens' Bank* v. *Ober*, 329.

2. The solicitor of the assignee cannot bid at an assignee's sale.—*Ibid.*
3. An agreement between a party who intends to bid at an assignee's sale and the assignee's solicitor, that the former will let the latter have the property at a fixed price without any reference to the amount at which it may be bought, does not vitiate the sale.—*Ibid.*
4. Where property is improperly taken from a receiver and sold under an order of the District Court, the purchase-money will be returned to the purchaser, when the sale is set aside.—*Davis et al., Trustees,* v. *Railroad Company et al.,* 258.

SET OFF.

1. A debtor of a bankrupt who merely accepts a transfer of the bankrupt's note without any stipulation concerning the terms of the transfer, holds it merely as trustee for the creditor, and cannot set it off against the debt due by him.—*In re Lane, Brett & Co., Ex parte Dreyfus,* 43.
2. The debt due to a stockholder for losses sustained by him on policies issued by the corporation cannot be set off against his indebtedness to the corporation for unpaid subscriptions to its stock.—*Scammon* v. *Kimball, Assignee,* 445.
3. A claim for losses on policies of insurance may be set off against an indebtedness from the holder to the company for money deposited with him as a banker.—*Ibid.*

STATE COURTS.—See JURISDICTION, 6–14; PRACTICE, 9–11.

STAY.

1. If the bankrupt appears in a proceeding in a State court to foreclose a mortgage, and moves for a stay of the proceedings, that portion thereof looking to a personal judgment against him should be stayed.—*McKay* v. *Funk,* 334.
2. A judgment entered after a motion for a stay of the proceedings is erroneous, although it provides that no execution shall issue until the further order of the court.—*Ibid.*
3. If the court is satisfied that the refusal, on a suggestion of his bankruptcy, of a continuance, has worked injustice to a defendant, it may in its discretion grant him a review.—*Todd et al.* v. *Barton et al.,* 197.
4. If a motion was made for a continuance upon a suggestion of the defendant's bankruptcy, before judgment, a discharge may be pleaded on the allowance of a writ of review.—*Ibid.*

SPECIFICATIONS.—See DISCHARGE, 4.

STOCKHOLDERS.—See CORPORATIONS, 7–18.

SUPPLEMENTAL ANSWER.—See PRACTICE, 8–10.

TAXATION.

1. When the marshal has concluded his services he may have his bill

taxed, if there is an assignee, without waiting for the presentation of the final account.—*In re Philip Rein*, 551.

2. Notice of the taxation may be given to the assignee, and it is not necessary to give notice to the creditors.—*Ibid.*
3. The assignee should examine the bill, and if he is satisfied that it is lawfully taxable at a certain amount, he may consent to its being taxed at that amount.—*Ibid.*
4. The consent of the assignee is a sufficient warrant for the clerk to tax a bill for the amount so consented to.—*Ibid.*
5. When the taxation is made, it is conclusive on the marshal and the assignee for the time being, and the marshal is entitled to receive the amount of his bill so taxed, unless it is shown that there is some fraud or bad faith on the part of the marshal or the assignee.—*Ibid.*

VOLUNTARY BANKRUPTCY.

1. If a voluntary bankrupt desires to amend the petition in a matter that affects the jurisdiction of the court, and he has been guilty of delay in applying for the amendment, his application for leave to amend should show the facts and reasons why the amendment was not asked for sooner.—*In re Edw. T. Wood*, 96.
2. A voluntary bankrupt who has contracted new debts since the filing of the prior petition, may file a new petition in bankruptcy.—*In re P. C. Drisko.*

See CORPORATIONS, 3.

WIFE OF BANKRUPT.—See ASSIGNEE, 345.

WILLS.—See ASSIGNEE, 6–12.

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